

2002

CCD, L.C., dka United Title Services of Southern Utah v. Christopher Lynn Millsap : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

CCD, L.C., a Utah limited liability
company d/b/a UNITED TITLE
SERVICES OF SOUTHERN UTAH,

Plaintiff-Appellee,

vs.

CHRISTOPHER LYNN MILLSAP, an
individual, and THE CHRIS AND
SANDRA MILLSAP FAMILY TRUST,

Defendants-Appellant.

Case No. 20020875-SC

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ORAL ARGUMENT IS REQUESTED

FILED
UTAH SUPREME COURT

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PAT BARTHOLOMEW
CLERK OF THE COURT

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I. JURISDICTIONAL STATEMENT.

This case proceeds from a grant of summary judgment in favor of CCD, L.C. (“CCD”) in a civil case by a district court. Pursuant to Utah Code Ann. § 78-2-2(3)(j), this Court has appellate jurisdiction.

II. ISSUES PRESENTED FOR REVIEW AND STANDARD FOR APPELLATE REVIEW.

Issues Presented for Appeal:

There are three issues raised by the appeal. The first issue for appeal is whether under the facts of this case appellant Christopher Lynn Millsap’s (“Millsap”) attempt to withdraw as a member of appellee CCD terminated his membership and therefore the expulsion provision of Section 48-2c-710(3) of Utah Code Ann. does not apply to him because it only applies to members?

The second issue for appeal is whether the trial court correctly ruled that the well recognized doctrine of first to breach rule under contract law barred appellant Millsap from enforcing any rights he had under the CCD operating agreement (“Operating Agreement”) and the amendment thereto (“Amendment” and collectively with the Operating Agreement referred to as “Amended Operating Agreement”), by his wrongful use of CCD’s trust account after the Amendment was signed, and, whether, consequently, Millsap is barred from enforcing the Amended Operating Agreement, including any right to retire and thereby withdraw from CCD and the prohibition of expulsion contained therein?

The third issue, which is a corollary to the first two issues, is whether the trial court properly ruled that Millsap’s material breaches of the Amended Operating Agreement

precluded him from claiming that CCD and its other members waived the right to expel him for his wrongful acts that occurred after the execution of the Amendment?

Standards for Appellate Review:

Millsap's appeal is from the trial court's denial of his motion for summary judgment and its ruling in favor of CCD's cross-motion for summary judgment. When there are no genuine issues of material facts and the moving party is entitled to judgment as a matter of law summary judgment should be granted. Utah R. Civ. P. 56(c). A trial court's legal conclusions are reviewed for correctness. *Standard Fed. Sav. & Loan v. Kirkbride*, 821 P.2d 1136, 1137 (Utah 1991). On an appeal from summary judgment, the appellate court considers "only two questions: whether the lower court erred in (1) applying the governing law, and (2) holding that no material facts were in dispute." *Nelson v. Salt Lake City*, 919 P.2d 568, 571 (Utah 1996) (*quoting Bushnell Real Estate, Inc. v. Nielson*, 672 P.2d 746, 749 (Utah 1983)); *see also Hill*, 2001 UT 16 at P12.

When reviewing whether the trial court correctly found there were no genuine issues of material fact, this Court "accept[s] the facts and inferences in the light most favorable to the nonmoving party." *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991) (citations omitted); *see also Estate Landscaping & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co.*, 844 P.2d 322, 324 n.1 (Utah 1992) (clarifying that court should review facts in light most favorable to nonmoving party, not the losing party). On appeal the Court "view[s] the facts somewhat differently when reviewing the trial court's rulings on the separate summary judgment motions." *Id.* Thus, in reviewing the trial court's denial of Millsap's motion for summary judgment, the facts are viewed in a light most favorable to

CCD. In reviewing the trial court's ruling on CCD's cross-motion for summary judgment, this Court reviews the facts in the light most favorable to Millsap. "The law requires that, as much as is possible, the trial court view the facts and reasonable inferences drawn therefrom in a light most favorable to the nonmoving party. It does not require unreasonable factual inferences, nor does it require that the court turn a blind eye to reasonable inferences on uncontested facts." *Surety Underwriters v. E & S Trucking*, 10 P.3d 338, 345 (Utah 2000) (holding that the rule does not prohibit a court from drawing reasonable inferences from uncontested facts even if they are unfavorable to nonmoving party.)

Additionally, this Court "will not consider the facts on appeal when there is no record the trial judge had access to those facts when deciding the motion at issue." *Govert Copier Painting v. Craig Van Leeuwen*, 801 P.2d 163, 170 (Utah Ct. App. 1990) (citing *Conder v. A.L. Williams and Assoc.*, 739 P.2d 634, 636 (Utah Ct. App. 1990)). Finally, the summary judgment Millsap appeals from may be affirmed

if it is sustainable on any legal ground or theory apparent from the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was considered or passed on by the lower court.

Bailey v. Bayles, 52 P.3d 1158, 1161 (Utah 2002) (quoting *Dipoma v. McPhie*, 2001 29 P.3d 1225 (Utah 2001) (other citations omitted)).

III. DETERMINATIVE STATUTES AND RULES.

The following are the determinative statutes and rules implicated by Millsap's appeal each of which are contained within the *Utah Revised Limited Liability Company Act*, Utah Code Ann. Sections 48-2c-101 *et seq* (the "Act") or the *Utah Rules of Civil Procedure*:

- A. UTAH CODE ANN. § 48-2c-120(f);
- B. UTAH CODE ANN. § 48-2c-502;
- C. UTAH CODE ANN. § 48-2c-708;
- D. UTAH CODE ANN. § 48-2c-709;
- E. UTAH CODE ANN. § 48-2c-710;
- F. UTAH CODE ANN. §48-2c-1102;
- G. UTAH CODE ANN. § 48-2c-1901; and
- H. Utah R. Civ. P. 56(c) and (e).

See Addendum Exhibit A, which is a copy of these statutes and rules.

IV. STATEMENT OF THE CASE.

Craig Newman (“Newman”), Doug Stanley (“Stanley”), and Millsap formed CCD on October 1, 1994, by signing CCD’s Articles of Organization and the related Operating Agreement on that date. The parties agreed that St. George, Utah would be CCD’s principal place of business and that Millsap would act as CCD’s “manager for the day-to-day affairs of the Company.” [Record on Appeal (“R.”) at 301, 327, Operating Agreement ¶ 7(A).] The Operating Agreement also provided that Millsap would work full-time in CCD’s St. George offices and that Newman and Stanley would work “primarily in Salt Lake County.” [R. 327, Operating Agreement at ¶ 7(B).] Thus, Millsap was entrusted with running the operations of the business away from the day to day supervision of the other members of CCD.

The purpose of the parties agreeing to form CCD was to engage in the title insurance business. As part of the statutory requirements to conduct business as a title insurance agency in the State of Utah, CCD was required to establish a trust account (“Trust Account”) into which is deposited all funds for settlement of closings of real estate transactions and other matters in which CCD acts as an escrow agent. When CCD receives money to be deposited into the Trust Account it assigns a file number for the depositor’s account. The

file number is the basis of accounting for all funds that are received and disbursed for a particular transaction for that client.

The Operating Agreement contains two provisions that are germane to this appeal. First, Section 13 provides that “No member may be expelled from the Company by act or desire of the remaining members.” [R. 334, Operating Agreement at ¶ 13.] Moreover, the Operating Agreement contains a provision that upon the retirement of a member CCD has the right to acquire the retiring member’s interest, and if it did not elect to do so the remaining members would have the opportunity to acquire the interest. If neither the company nor its remaining members elect to purchase the interest then “the Company shall be wound up and all its properties distributed in liquidation. . . .” [R. 331-332, Operating Agreement at 12(B).] Section 16 of the Operating Agreement also provides that CCD shall be dissolved upon the retirement of a member unless his interest was purchased in accordance with Section 12(B). [R. 335, Operating Agreement.]

In March, 2000, Newman and Stanley discovered that Millsap wrongfully took over \$625,000 from the Trust Account and used that money to finance the Pheasant Meadow Subdivision located in Washington County (“Pheasant Meadow Property”), a development in which he had an ownership interest. [R. 292, Stanley Aff’d at ¶ 4; R. 301-302, Newman Aff’d at ¶ 9.] After Millsap admitted to Newman and Stanley that Millsap took funds from the Trust Account, on April 21st, 2000, the parties agreed to amend the Operating Agreement to prevent Millsap from having access to the Trust Account and to minimize his involvement with the company while he repaid the amounts he took from the account. [R. 311, Newman Aff’d at ¶ 16; R. 418, Amendment.] In connection with the Amendment, Newman agreed

to lend Millsap money (“Newman Loan”) to be used to repay the Trust Account for money Millsap wrongfully took. [R. 311, Newman Aff’d; R. 414-16, which is a copy of the Promissory Note.] The Amendment expressly stated Millsap was not authorized “to withdraw funds from CCD’s general or escrow accounts.” [R. 311, Newman Aff’d; 419, Amendment at ¶ B.] Paragraph B of the Amendment also eliminated any rights Millsap had under Section 12(B) of the Operating Agreement in the event that he were to die, retire or his employment with CCD were terminated. [R. 419, Amendment at ¶ B.] The parties agreed, however, that if Millsap timely repaid the Newman Loan, and the Operating Agreement was not thereafter modified within a year after repayment of the loan, the modifications to the Operating Agreement set forth in paragraphs B and C thereof would be of no further force or effect “and the terms of the Operating Agreement shall thereafter be binding upon the parties.” [R. 420, Amendment at ¶ C.] Almost immediately after the Amendment was signed, Millsap began to misuse the Trust Account in breach of the Amended Operating Agreement.

Course of Proceeding and Disposition of the Trial Court:

On March 6, 2002, Millsap moved for summary judgment claiming that because he retired he was no longer a member of CCD. Consequently, he claims that because he is not a member he could not be expelled as a member of CCD under UTAH CODE ANN. § 48-2c-710, because it only applies to members. Alternatively, he argued that the Amendment provides that because he timely repaid the Newman Loan, all of the conditions precedent have been met for his alleged rights to be reinstated under the Operating Agreement as provided under paragraph C of the Amendment.

On March 27, 2002, CCD filed a cross-motion for summary judgment pursuant to Utah Code Ann. Section 48-2c-710 which provides that a company may seek to expel a member who has materially breached the operating agreement or engaged in wrongful conduct adversely and materially affecting the company's business. In support of its cross-motion, CCD laid out in painstaking detail Millsap's breaches of CCD's Amended Operating Agreement, both before and after execution of the Amendment. CCD's cross-motion and the facts showing Millsap's misuse of funds from CCD's trust account were supported by the Affidavits of Newman and Stanley, together with supporting documentation.

Millsap filed an opposition memorandum to CCD's cross-motion, but did not file an affidavit or other evidence that disputed CCD's undisputed statement of facts. CCD contended that Millsap's wrongful behavior both before and after the Amendment was signed constituted grounds for expelling him as a member because he breached both the Operating Agreement and the Amended Operating Agreement. Millsap's wrongful conduct, therefore, constituted material breaches of the Amended Operating Agreement that adversely and materially affected the company's business, which is based upon the trust of its customers.

CCD argued that any right Millsap had under the Amendment to reinstatement of the prohibition against expulsion under Section 13 and any right to retire under Section 12(B) of the Operating Agreement were unenforceable for several reasons. First, CCD argued that the Act clearly allowed a company to seek the expulsion of a member regardless of any alleged voluntarily withdrawal. As an alternative and consistent common law theory, CCD also moved for summary judgment based upon the doctrine of the first to breach rule. CCD argued that Millsap could not enforce the Amended Operating Agreement because his

manipulation of the Trust Account after the Amendment was signed constituted material breaches of the Amended Operating Agreement. Consequently, any right Millsap had to retire as a member thereunder was ineffective because under the first to breach doctrine, Millsap was powerless to enforce any of his contractual rights. Because he could not enforce the Amended Operating Agreement he was powerless to withdraw from CCD. He is, therefore, a member of CCD and is subject to the expulsion for his material breaches of the Amended Operating Agreement.

Finally, CCD argued that Newman and Stanley were fraudulently induced to enter into the Amendment. Consequently, the Amendment was unenforceable and any right to reinstate Millsap to all of his rights under the Amended Operating Agreement was void. The trial court denied summary judgment on that ground stating there were disputed issues of material facts about whether an accounting prepared by Millsap that he gave to Newman and Stanley that purported to show the extent of Millsap's misuse of the Trust Account was a representation that it was the entire extent of his misuse of Trust Account funds or an estimate.

On June 6, 2002, during oral argument on the pending motions for summary judgment, the trial court granted CCD's cross-motion for summary judgment, and accordingly, denied Millsap's motion. [See Transcript of June 6, 2002 hearing at 28-30.] Pursuant to the trial court's request, CCD submitted proposed Findings of Fact and Conclusions of Law. On July 2, 2002, Millsap submitted his Objections to Proposed Findings of Fact and Conclusions of Law, Motion for Reconsideration, and Memorandum in Support ("Motion to Reconsider"). [R. 552-528, Motion to Reconsider.] Together with

Millsap's Motion to Reconsider, he submitted an Affidavit, dated July 2, 2002, wherein he attempted, for the first time, to raise issues of fact regarding whether he had materially breached the Amendment to the Operating Agreement. [R. 531-532.] He argued, therefore, that CCD waived the right to claim that his signing checks drawn on the Trust Account were material breaches of the Amendment. Millsap's assertion, however, fails for two reasons. First, it is tardy. He failed to raise the issue in connection with his opposition to CCD's cross-motion for summary judgment. In addition, his affidavit does not state, nor could it, that Newman and Stanley knew that the checks signed by Millsap were in fact additional manipulations of Trust Account funds in violation of the Amended Operating Agreement.

On August 29, 2002, the trial court denied Millsap's motion and entered the proposed Findings of Facts and Conclusions of Law on September 3, 2002, and summary judgment in favor of CCD. [R. 585, 586-590.] The trial court agreed with CCD's argument, that under the facts of this case, Millsap had no right to retire because of the Act's explicit allowance that a company may seek a member's expulsion. Additionally, the trial court found that Millsap's material breaches of the Amended Operating Agreement precluded him from enforcing the terms of that agreement against CCD pursuant to the first to breach rule. Millsap has appealed the trial court's refusal to grant his motion for summary judgment and the trial court's ruling granting CCD's motion for summary judgment. The trial court properly expelled Millsap from CCD.

V. STATEMENT OF FACTS.

The following is a summary of CCD's statement of facts, that were set forth in its memorandum in support of its motion for summary judgment, and undisputed by Millsap:

1. CCD was formed on October 1, 1994, pursuant to the Articles of Organization of CDC, L.C. CCD's Articles of Organization was signed by all of its members, Millsap, Newman and Stanley. On that same date all CCD members signed the related Operating Agreement. The Operating Agreement identifies Newman, Stanley and Millsap as members of CCD. [R. 300-301, Newman Aff'd at ¶¶ 6, 7 and 8; R. 324-341, Exhibit 2, Operating Agreement.]

2. CCD is engaged in the title insurance business. As part of the statutory requirements to conduct business as a title insurance agency in the State of Utah, CCD was required to establish the Trust Account into which is deposited all funds for settlement of closings of real estate transactions and other matters in which CCD acts as an escrow agent. When CCD receives money to be deposited in the Trust Account it assigns a file number for the depositor's account. The file number is the basis of accounting for all funds that are received and disbursed for a particular transaction for that client. [R. 300, Newman Aff'd at ¶¶ 4 and 5.]

3. The Operating Agreement provided that the initial manager of CCD would be Millsap who would work full time in St. George, Utah running its day-to-day operations. He had access to the Trust Account, was authorized as a signatory on that account and was licensed as an escrow agent under Utah law. While an employee of CCD, Millsap was primarily responsible for the management and operation of the Trust Account. [R. 301, 327, Newman Aff'd at ¶¶ 7 and 8, and Exhibit 2, which is the Operating Agreement at ¶ 7(A).]

4. Section 7(E)(vii) of the Operating Agreement provides that "No Member, without the majority consent of the Members, shall: use the name, credit or property of the

Company for any purpose other than a proper Company purpose.” Likewise, Section 7(E)(viii) of the Operating Agreement forbids any member from engaging in “any act detrimental to the Company business or which would make it impossible to carry on business.” [R. 328-329, Operating Agreement at § 7(E).]

5. In approximately March, 2000, Newman and Stanley discovered that Millsap wrongfully took over \$625,000 from the Trust Account and used that money to finance the Pheasant Meadow Property located in Washington County. Millsap admitted to Newman that Millsap withdrew monies from the Trust Account for use in connection with development of the Pheasant Meadow Property, that was owned, in part, by Defendant The Chris and Sandra Millsap Family Trust of which Millsap is a beneficiary. [R. 301-302, 303-306, Newman Aff’d at ¶¶ 9 and 12.]

6. In March 2000, after Newman discovered that Millsap took money from the Trust Account, Millsap gave Newman and Stanley a handwritten accounting he prepared (“Millsap Accounting”) in which he purported to identify unauthorized funds he withdrew from the Trust Account and deposits he claimed he made into the Trust Account to repay a portion of the monies he took. [R. 302-306, Newman Aff’d at ¶¶ 11 and 12; R. 343-345, Millsap Accounting; R. 347-348, Millsap Accounting that was typed; R. 350, Explanation of Millsap Accounting.]

7. Millsap initially misappropriated at least \$625,000 from the Trust Account. [R. 303-306, Newman Aff’d at ¶ 12; R. 352-378, Exhibits 6 through 19 thereto, that are copies of the unauthorized checks drawn upon the Trust Account by Millsap.]

8. On March 4, 2000, a special meeting of the members of CCD was held (“Special Meeting”) to discuss Millsap’s unauthorized use of funds on deposit in the Trust Account. All members attended the meeting. During the Special Meeting the members discussed repayment of the amounts he took from the Trust Account. Minutes of the Special Meeting (“Minutes”) were prepared and signed by him. During the meeting he agreed to execute a trust deed note in favor of CCD securing “the Trust Account discrepancies. . . .” [R. 380, Exhibit 20 of the Newman Aff’d, which is a copy of the Minutes.] The Minutes state that during the Special Meeting Millsap “admitted diverting trust funds for personal use to his real estate development known as Pheasant Meadow Subdivision.” [R. 306, Newman Aff’d at ¶ 13; R. 380-381, Minutes.]

9. Newman agreed to lend Millsap \$493,965.04 pursuant to a promissory note, dated April 21, 2000 (“Note”), to enable him to eliminate the deficiency in the Trust Account. The amount of the Note was exactly the amount Millsap showed was the deficiency in the Trust Account in the Millsap Accounting. In connection with the execution of the Note, on April 21st, 2000, all members of CCD executed the Amendment to the Operating Agreement of CCD, L.C.’s Members (“Amendment”). [R. 311, Newman Aff’d at ¶ 16; R. 414-416, 418-421, Exhibits 24 and 25 of the Newman Aff’d.]

10. At the time Millsap’s misuses of the Trust Account were discovered in March 2000, he agreed with Newman and Stanley not to have any further involvement with the Trust Account, including directing the use or signing of any checks drawn upon that account. Moreover, in the Amendment Millsap agreed he would “have no authority to withdraw funds

from CCD's general or escrow accounts." [R. 311, Newman Aff'd. at ¶ 17; R. 418-421, Exhibit 25 of the Newman Aff'd., which is a copy of the Amendment at ¶ 8.]

11. At the request of the Utah State Insurance Department in January 2001, Newman began investigating the sources of deposits shown on the Millsap Accounting that Millsap claimed he made to repay the Trust Account. Newman's investigation of the Millsap Accounting revealed that Millsap misstated the amount of missing funds from the Trust Account in the amount of approximately \$11,000 by showing in the Millsap Accounting payments to the Trust Account that were in fact merely transfers of moneys from other Trust Account depositors and refunds of property taxes belonging to other depositors. [R. 306-310, Newman Aff'd ¶ 14.]

12. After Millsap's misuse of funds deposited in the Trust Account was discovered and after the Amendment was signed, Millsap again began to manipulate funds on deposit in the account for his personal benefit. For example, he used CCD's customer file number 10449 ("Gren Account Number") for later transactions involving his company Gren Development. Originally that account file number was used for a commitment for title insurance for a construction loan made by Sandra I. Jones and Veral Isom to Gren Development in the amount of \$50,000 ("Isom Loan"). The Isom Loan was secured by a trust deed (Gren Trust Deed). Pursuant to the Gren Trust Deed, Gren Development was the trustor, Sandra I. Jones and Verla Isom were the beneficiaries and United Title Services of Utah, Inc. was the trustee. The Isom Loan secured by the Gren Trust Deed funded on March 7th, 2000. On April 25th, just four days after the Amendment was signed, a wire transfer in the amount of \$45,000 was made into the Trust Account that was accounted for

under the previously closed Gren Account Number. The deposit slip states the funds came from Pat Dixon. [R. 311-312, Newman Aff'd at ¶ 18; R. 433, Exhibit 31 which is a copy of the check.] On that same day Millsap endorsed check number 39619 drawn upon the Trust Account made payable to Gren Development ("Gren Check") in the same amount. [R. 437, Exhibit 33 of Newman Aff'd, a copy of which is attached hereto as Addendum Exhibit B.] The use of the same file number for separate transactions violated CCD's policy for accounting for such transactions. [R. 311-312, Newman Aff'd at ¶ 18; R. 423-435, Exhibits 26 through 32 attached thereto.] Millsap admits in his statement of facts at Paragraph 34(b)(iii) that these checks were written for his personal use, and thus, in violation of his obligations under the Amended Operating Agreement. [R. 478, Millsap's Responses to CCD's Statement of Undisputed Facts, *see also* Brief of Appellant ("Millsap Brief"), at 15-16.]

13. Another incident in which Millsap signed checks drawn upon the Trust Account that constituted a wrongful use of that account occurred after he signed the Amendment. The incident occurred on September 29, 2000, in connection with the sale of real estate ("Ford Property") by Shelly Reynolds-Ford to Milton L. Tippetts. The sale of the Ford Property was closed ("Tippetts Closing") using CCD as the escrow agent. Pat Dixon held a deed of trust ("Dixon Trust Deed") that encumbered the Ford Property. United Title Services of Utah, Inc. was the trustee of the Dixon Trust Deed. Newman was the owner of United Title Services of Utah, Inc. and routinely signed deeds of reconveyances of trust deeds. Line 504 of the settlement statement for the Tippetts Closing showed that \$81,271.91 was to be disbursed to Pat Dixon from the sales proceeds. [R. 448, check in the amount of

\$81,271.91, a copy of which is attached hereto as Addendum Exhibit C.] Check number 42600, in the amount of \$81,271.91 (“First Check”), was prepared in connection with that closing. Millsap signed the First Check. [R. 448.] A copy of the First Check was sent to Newman in the ordinary course of business. [R. 312-313, Newman Aff’d, at ¶ 18.] That check was sent to him to induce him to cause United Title Services of Utah, Inc. to execute a deed of reconveyance for the Dixon Trust Deed thereby releasing the subject property from that encumbrance. After receiving a copy of the First check Newman immediately began to investigate whether Millsap was using the Trust Account in violation of the Amendment. Newman discovered that Millsap voided the First Check and in its stead caused two checks to be issued, the total amount of which equaled the amount of the First Check. One of the new checks was payable to Gren Development, Millsap’s company, dated October 3, 2000, in the amount of \$70,000 (“Second Check”), signed by Millsap, and the other check was payable to Dixon dated October 3, 2000, in the amount of \$11,271.91 (“Third Check”), also signed by Millsap. [R. 312-313, Newman Aff’d at ¶ 19; R. 439-454, copies of these checks are attached as Addendum Exhibit D.] Gren Development was not even identified as a party in any respect to the Tippetts Closing. [R. 312, Newman Aff’d at ¶ 19; R. 439-454, Exhibits 34 through 39 attached thereto.]

14. On October 13, 2000, after discovering Millsap’s new unauthorized uses of the Trust Account, Newman terminated Millsap’s employment with CCD. [R. 313, Newman Aff’d at ¶ 20.]

15. On May 18, 2001, Millsap’s license as an escrow agent issued by the Utah Insurance Department was revoked, pursuant to the Stipulation & Order of the Department.

[R. 314, Newman Aff'd at ¶ 21; R. 460-464, Exhibit 41 attached thereto, which is a copy of the Stipulation & Order.]

16. Newman has never verbally or in writing given his consent to Millsap withdrawing as a member of CCD. [R. 314, Newman Aff'd at ¶ 22.]

17. As recently as July, 6, 2001, Millsap has demanded involvement in CCD's business. Through his counsel David Carter, Millsap stated he "was becoming increasingly concerned about the management of the company and its failure to observe [his] membership rights and to communicate with and appropriately involve [him]" in CCD's business affairs. [R. 314, Newman Aff'd at ¶ 23; R. 466-467, Exhibit 43, which is a copy of the letter sent by Mr. Carter.] Moreover, on September 7, 2001, Millsap's counsel demanded extensive financial information concerning CCD based upon Millsap's alleged rights under the Operating Agreement. [R. 314, Newman Aff'd. at ¶ 24; R. 469, Exhibit 44, which is a copy of Millsap's counsel's letter.]

18. On July 16th 2001, the State of Utah filed a criminal information statement against Millsap alleging 13 counts of unlawful dealing of property by a fiduciary and one count of racketeering ("Information"). [See R. 273-290, attached as Exhibit B to CCD's Summary Judgment Memorandum.] On March 6, 2002, Millsap plead guilty to five counts of third degree felony involving the Trust Account ("Statement") set forth in the Information. [See R. 263-271, attached as Exhibit A to CCD's Summary Judgment Memorandum.] In his Statement he plead guilty to counts one through five of the Information. Counts one through five of the Information are for unlawful use of funds taken from the Trust Account that are evidenced by five checks. Those checks correspond directly with the checks listed in the

Millsap Accounting, which are also identified in Newman's Affidavit as funds wrongfully taken from the Trust Account. [See R. 263-290, Statement of Defendant; 303-304, Newman Aff'd. at ¶¶ 12c, d, e, f, and g; and R. 343-345, Exhibit 3 thereto, which is a copy of the Millsap Accounting.]

VI. SUMMARY OF ARGUMENT.

This Court should uphold the trial court's grant of summary judgment in favor of CCD expelling Millsap as a member. The undisputed evidence establishes beyond any doubt that Millsap materially breached the Operating Agreement both before and after signing the Amendment. Indeed, Millsap concedes that he misused over \$625,000 of Trust Account funds prior to signing the Amendment, and again wrote two checks after signing the Amendment for his personal use totaling approximately \$115,000. [R. 476-478, Millsap's Responses to CCD's Statement of Undisputed Facts at ¶¶ 4, 11 and 12.] Millsap's misuse of the Trust Account for his individual purposes resulted in the revocation of his escrow agent's license and a guilty plea to five felony counts. Millsap's wrongful actions have damaged CCD's goodwill which is based upon the trust of its customers. Thus, pursuant to Utah Code Ann. § 48-2c-710, the trial court correctly expelled Millsap finding that his actions constituted material breaches of the Amended Operating Agreement.

Millsap argues as the basis for his appeal that summary judgment in favor of CCD was inappropriate because there are issues of facts precluding summary judgment in favor of CCD. Millsap asserts that he raised an issue of fact by submitting an affidavit dated July 2, 2002, with his Motion to Reconsider nearly one month after the trial court held oral argument and issued its ruling in favor of CCD. Rule 56(e) of the *Utah Rules of Civil Procedure* states

that a party must provide specific evidence in order to create an issue of fact at summary judgment. A party cannot raise issues of fact through an affidavit submitted after a summary judgment ruling. Such is the case with Millsap's untimely affidavit. Moreover, even if the Court considers Millsap's affidavit, it fails to raise an issue of fact precluding summary judgment. The affidavit merely states that Newman and Stanley were aware that Millsap was signing checks drawn on the Trust Account. The affidavit does not state, nor could it, that Newman or Stanley were aware that Millsap was again misdirecting money for his personal use or that Millsap took steps to conceal his wrongful actions from his partners. In short, Millsap's tardy affidavit does not raise an issue of fact precluding summary judgment in favor of CCD.

Millsap also argues that CCD cannot expel him because he voluntarily withdrew as a "member" by submitting his notice of retirement prior to the judicial determination that he should be expelled. Millsap's interpretation of the Act must fail because it guts a company's right to seek expulsion of a member whose actions have harmed the company and in the process extinguish the member's ability to enforce his or her rights against the non breaching members. The Act's careful statutory scheme makes clear that the purpose of an expulsion proceeding is to prevent a member who has materially breached an operating agreement from continuing to make demands upon the company. Millsap's rights, including the right to retire, were severed after he materially breached the Amended Operating Agreement by misdirecting funds for himself. This interpretation of the Act is also consistent with the trial court's ruling that Millsap lost his right to retire or enforce the terms of the Amended Operating Agreement by virtue of the common law first to breach rule.

Millsap further argues that CCD waived its right to expel him because Newman and Stanley signed the Amendment after learning of his first wrongdoing. Newman and Stanley agreed to reinstate Millsap rights if certain conditions were met. Millsap, however, lost the right to reinstatement when he breached his agreement contained in the Amendment to not withdraw monies from the Trust Account, by diverting funds for his personal use in violation of his obligations under the Amended Operating Agreement, and by intentionally misleading Newman and Stanley of his actions after signing the Amendment. Simply put, CCD could not have waived its right to seek Millsap's expulsion because Millsap's wrongful acts continued even after the Amendment was signed.

Finally, Newman and Stanley's actions in seeking Millsap's expulsion were not taken in bad faith as alleged by Millsap. Millsap argues that CCD's expulsion claim is an overt move to acquire his financial interest in CCD. The fallacy in this argument is exposed by clear provisions of the Act that provide a member who is expelled retains the status of an assignee. *See* UTAH CODE ANN. §§ 48-2c-708, 1102. Newman and Stanley clearly have nothing to gain from expelling Millsap other than to prevent Millsap from making continued demands upon the company, including his desire to dissolve and liquidate the company. Moreover, there is simply no evidence supporting Millsap's claims that Newman and Stanley have acted in bad faith.

VII. ARGUMENT.

1. THE TRIAL COURT CORRECTLY FOUND THAT MILLSAP MATERIALLY BREACHED THE AMENDED OPERATING AGREEMENT AND THAT HIS WRONGFUL CONDUCT ADVERSELY AND MATERIALLY AFFECTED CCD.

In granting CCD's cross-motion for summary judgment the trial court held that Millsap materially breached both the Amendment and Operating Agreement and that his wrongful conduct materially and adversely affected CCD. [R. 586-590, Findings of Facts Conclusions of Law.] Consequently, the trial court found pursuant to Utah Code Ann. § 48-2c-710 Millsap should be expelled as a member. [R. 589.] Specifically, the court found that Millsap's manipulations of the Trust Account for his personal use after the Amendment was signed constituted material breaches of the Amended Operating Agreement that materially and adversely affected CCD. [R. 589.]

Millsap attempts to manufacture an issue of fact as to whether or not he breached the Amended Operating Agreement claiming that CCD's members knew he was signing checks drawn on the Trust Account after the Amendment was signed and, thereby waived the right to claim Millsap breached the amended Operating Agreement. Based upon the undisputed evidence in the record, however, Millsap's argument must fail because he did not timely offer the evidence, and the evidence he offered for waiver does not show that Newman or Stanley knew of Millsap's wrongful use of funds on deposit in the Trust Account after the Amendment was signed.

A. Millsap's Misuse and Misappropriation of Funds from the Trust Account After He Signed the Amendment Are Undisputed and Constitute Material Breaches of the Amended Operating Agreement and Materially and Adversely Affected CCD.

CCD went to great lengths to set forth the factual basis of Millsap's repeated misuse of funds on deposit in the Trust Account. The facts of Millsap's continued misuse of funds on deposit in the account even after signing the Amendment were undisputed at summary judgment. [R. 248-249, 477-478, CCD's Statement of Undisputed Facts, and Millsap's Response.] Because Millsap failed to dispute CCD's statement of undisputed material facts prior to the trial court's hearing and ruling on the cross-motion for summary judgment, he cannot now attempt to manufacture a dispute, because CCD's unrebutted statement of facts are deemed to be admitted. Rule 56(e) provides in pertinent part as follows:

When a motion for summary judgment is made and supported as provided in this rule, **an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial.** If he does not so respond, summary judgment, if appropriate, shall be entered against him.

U. R. CIV. PRO. RULE 56(e) (emphasis added). *See also Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120, 124-25 (Utah 1994) (stating that party opposing motion for summary judgment supported by affidavit has affirmative duty to respond with affidavit or other evidence); *D & L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989) (same). Consistently, numerous Utah cases elaborating on Rule 56(e) have held that where a party fails to establish material issues of fact through affidavit or otherwise, parties cannot later raise issues of fact not originally presented to the court. In *Watkiss & Campbell v. Foa & Son*, for instance, this Court restated the rule by holding as follows: "[Defendant] . . . was thus obligated to do more than simply

rely upon the allegations contained in its pleadings. Not having done so, either by the filing of counter-affidavits or on appropriate cross-motion for summary judgment, the issue was not raised and cannot now be raised for the first time on appeal.” 808 P.2d 1061, 1067 (Utah 1991); *see also* *Busch Corp. v. State Farm Fire & Cas. Co.*, 743 P.2d 1217, 1219 (Utah 1987) (citation omitted) (stating trial court may properly conclude no genuine issues of fact exist unless face of nonmovant's affidavit affirmatively discloses existence of such issue).

In the Amendment, the members agreed that Newman would loan Millsap funds in order to pay back the monies he misappropriated from the Trust Account. [R. 418, Amendment ¶ 3.] Millsap agreed in the Amendment to relinquish his rights under the Operating Agreement, including the right to retire, and to dissolve or wind up the business. [R. 419, Amendment ¶ B.] The Amendment provided that if Millsap repaid the monies, did not default on the repayment of the loan, and there were no additional amendments to the Amended Operating Agreement within one year, his rights under the Operating Agreement would be restored. [R. 419-420, Amendment ¶ C.] Millsap also agreed to be removed as a manager of CCD and agreed that he had no authority to withdraw funds from CCD's general or escrow accounts. [R. 418-419, Amendment ¶ A.] Newman, Stanley and CCD expressly stated, however, that they did not “waive any claims they may have against Millsap, including claims under the Operating Agreement, at law or in equity. Millsap hereby acknowledges and agrees that Newman, Stanley and CCD have and are reserving any and all such claims.” [R. 420, Amendment ¶ E.] By the Amendment, therefore, CCD's members agreed to give Millsap a second chance. Even after being given a second chance, however, Millsap breached his commitments in the Amended Operating Agreement.

Millsap admits that he intentionally misdirected and misappropriated monies from two separate closings in April and September of 2000. [R. 248-249, CCD's Statement of Undisputed Facts at ¶¶ 11 and 12; R. 478, Millsap's Response to CCD's Statement of Undisputed Facts at ¶¶ 11 and 12; and Millsap Brief, at 15-16 ¶ 34(b)(iii).] Indeed, Millsap did not dispute the evidence submitted by CCD that proves without any doubt that Millsap not only misdirected Trust Account funds for his personal use after signing the Amendment, but that he intentionally mislead Newman and Stanley of his wrongful actions. Thus, in addition to breaching his agreed upon obligation to have no authority to withdraw funds from the Trust Account, these continued misrepresentations were new violations of the Operating Agreement and Utah law.

This Court in *Polyglycoat Corporation v. Holcomb*, in the context of a rescinded contract, stated that a material breach was a “failure of performance which ‘defeats the very object of the contract’ or ‘[is] of such prime importance that the contract would not have been made if default in that particular had been contemplated’ is a material failure.” 591 P.2d 449, 451 (1979) (citations omitted)¹; see also *Industrial Constr. v. State*, 1978 Utah Lexis 1186 (Utah) (finding that failure to performance essential part of a contract was a material breach). Millsap's actions constituted new material breaches of the Amended Operating Agreement because they cut to the very heart of his contractual obligations.

¹While *Polyglycoat* deals with the question of a rescinded contract, the Court's discussion of a “material breach” is also useful in this context. Millsap misconstrues CCD's argument as one for rescission. CCD does not argue that the Amended Operating Agreement should be rescinded, but rather that Millsap lost his rights of enforcement through his wrongful acts in violation of that agreement.

CCD is engaged in the title insurance and escrow business and is entrusted with significant sums of monies by third parties. Those parties expect their funds will be carefully and strictly accounted and cared for by the company. Clients expect the utmost integrity in dealing with their assets. To engender this trust Section 7(E)(vii) of the Operating Agreement expressly prohibited Millsap and CCD's other members from "us[ing] the name, credit or property of the Company for any purpose other than a proper Company purpose." [R. 328-329.] Likewise, Section 7(E)(viii) of the Operating Agreement forbade him and the other members from engaging in "any act detrimental to the Company business or which would make it impossible to carry on business." [R. 328-329, Exhibit 2 of Newman Aff'd, which is a copy of the Operating Agreement, at ¶¶ 7(E) (vii) and (viii).] And, after Millsap's misconduct was discovered, the Amendment expressly provided that he had "no authority to withdraw funds from CCD's general or escrow accounts." [R. 418-419, Amendment at ¶ A.] Each of these provisions constituted material terms of the Amended Operating Agreement and were undisputedly breached by Millsap. Thus, the trial court correctly found that there were no disputed issues of fact precluding summary judgment, and that Millsap materially breached the Amended Operating Agreement and that these material breaches materially and adversely affected CCD. [R. 589, Conclusions of Law.]

B. Millsap's July 2, 2002 Affidavit Should Not be Considered Because It is Untimely and Irrelevant.

Millsap attempts to raise an issue of fact of whether he "materially" breached the Amended Operating Agreement that was not raised in opposition to CCD's cross-motion for summary judgment. The undisputed facts set forth above were properly before the trial court

and were more than sufficient to support its ruling that Millsap materially breached the Amended Operating Agreement and that such conduct materially and adversely affected CCD's business. Indeed, Millsap presented no facts that contradicted the trial court's finding of material breach. Millsap even concedes in his brief that the trial court found that "in its oral ruling the Court seemingly adopted the first breach rule in refusing to allow Mr. Millsap to enforce the Amendment to the Operating Agreement." [R. 527, Millsap Brief at 36, n. 20].

In his Motion to Reconsider, however, Millsap reasserted the same legal arguments that were previously rejected by the trial court, but then raised for the first time in an affidavit dated July 2, 2002, the issue that CCD's other members were aware that he was signing checks drawn on the Trust Account after the Amendment was signed. [R. 531-532, Millsap's July 2, 2002 Affidavit.] Millsap's affidavit, however, was submitted one month after the trial court ruled in CCD's favor.

Pursuant to Rule 56(e) and clear Utah case law, CCD's statements of fact are deemed admitted. The time for Millsap to contest CCD's statement of facts was prior to the trial court's ruling on the pending summary judgment motions. Millsap cannot raise issues of fact through his tardy affidavit submitted one month after the trial court held the summary judgment hearing and issued its oral ruling. Millsap cannot rely upon the facts set forth in his July 2, 2002, affidavit (that was untimely filed) to create issues of fact that preclude summary judgment based upon the facts before the trial court when it ruled on the pending motions for summary judgment. This Court has held that "[w]e will not consider the facts on appeal when there is no record the trial judge had access to those facts when deciding the motion at issue." *Govert Copier Painting v. Craig Van Leeuwen*, 801 P.2d 163, 170 (Utah

Ct. App. 1990) (*citing Conder v. A.L. Williams and Assoc.*, 739 P.2d 634, 636 (Utah Ct. App. 1990)). Millsap did not timely file his affidavit in opposition to CCD's cross-motion for summary judgment, and therefore, it should not be considered on appeal.

Moreover, Millsap's tardy affidavit is irrelevant and fails to raise any issue of fact as to his material breaches of the Amended Operating Agreement. In his affidavit dated July 2, 2002, Millsap states both Newman and Stanley were aware that Millsap was signing checks drawn on the Trust Account. [R. 532, Millsap Aff'd at ¶ 6.] This fact is irrelevant because his wrongful conduct was more than signing checks drawn on the Trust Account, it included manipulating Trust Fund accounts and monies for his personal use. Even if CCD's other members knew he was signing checks drawn on the Trust Account, they did not know, nor was there any evidence offered by Millsap that they did know, that he continued to use the Trust Account for personal business in violation of the Amended Operating Agreement. Indeed, Millsap does not contest that he misused the Trust Account for his personal use after signing the Amendment, nor does he contest that he actually misappropriated a check in the amount of \$70,000 that should have been paid to Dixon. [R. 248-249, CCD Statement of Undisputed Facts; R. 478, Millsap's Response at ¶ 12.] Millsap also does not state Newman or Stanley knew Millsap was engaging in wrongful conduct at the time it occurred. [R. 531-532, Millsap Aff'd.]

Moreover, whether or not the other members of CCD were aware that Millsap was signing Trust Account checks does not alter the fact that Millsap continued to breach the Amended Operating Agreement, even after having been given a second chance. The fact that Newman and Stanley agreed to reinstate Millsap's rights under the Operating Agreement if

Millsap fulfilled certain conditions was premised upon the fact that Millsap would cease his misuse and misappropriation of Trust Account funds. Thus, based upon the undisputed facts before it on cross-motions for summary judgment, the trial court correctly found that there was no issue of fact that Millsap materially breached either the Amendment or Operating Agreement.

Likewise, this Court should disregard Millsap's attempts to create issues of fact through his tardy affidavit, and consider his appeal based upon the undisputed facts set forth in support of CCD's cross-motion for summary judgment.

C. CCD Did Not Waive its Right to Seek Judicial Expulsion of Millsap for Millsap's Continued Defalcations after the Amendment Was Signed.

Millsap argues that CCD waived its right to expel him by signing the Amendment that allegedly restored his rights under the Operating Agreement if the Newman Loan was timely repaid. Millsap admits that he materially breached the Operating Agreement by wrongfully taking hundreds of thousands of dollars from the Trust Account. Millsap submits, however, that because he fulfilled three conditions set forth in the Amendment, his rights under the Operating Agreement were restored – including the right to retire. Millsap's argument ignores the undisputed evidence in this case that supports the trial court's finding that Millsap materially breached the Amended Operating Agreement even after allegedly "coming clean." Millsap's argument fails for two reasons: (1) undisputed facts show that Millsap materially breached the Amended Operating Agreement through his continued wrongful use of Trust Account funds as late as October 2000; and (2) there are no facts that would support a finding that CCD intentionally waived its statutory right to seek Millsap's expulsion.

Utah law is clear on the elements needed to find waiver: “A waiver is the intentional relinquishment of a known right There must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it.” *Geisdorf v. Doughty*, 972 P.2d 67, 72 (Utah 1998) (quoting *Soter's Inc. v. Deseret Fed. Sav. & Loan Ass'n.*, 857 P.2d 935, 942 (Utah 1993) (other citation omitted)). “An intent to waive must be shown by action or conduct which is unequivocal and which is inconsistent with any other intent.” *Webb v. R.O.A. Gen., Inc.*, 804 P.2d 547, 552 (Utah Ct. App. 1991) (finding that there was no competent evidence to support argument that plaintiff had “an unequivocal intent . . . to waive his contractual rights.”) (citing *Barnes v. Wood*, 750 P.2d 1226, 1230 (Utah Ct. App. 1988)). Similarly, there is no competent evidence to support a finding that CCD intentionally waived its statutory right to seek Millsap’s expulsion.

First, CCD’s non-breaching members gave Millsap a second chance, and he defiled their trust not once but twice. CCD’s statement of facts explain in great detail how Millsap continued to misappropriate monies in property closings even as late as October 2000. [R. 243-249.] As previously set forth, in April 2000, Millsap improperly funneled money through a closed file number to his company Gren Development. [R. 311-312, Newman Aff’d at ¶ 18.] Then in September and October 2000, Millsap misappropriated an additional \$70,000 from a real estate closing that was paid to his company Gren Development instead of paying off the Dixon Trust Deed. [R. 312-313, Newman Aff’d at ¶ 19.] Thus, CCD could not have waived its right to seek expulsion by signing the Amendment, because Millsap’s wrongful acts occurred after the Amendment was signed. Nothing in the Amendment states CCD was waiving any rights to any claims against Millsap. To the contrary, Newman,

Stanley, and CCD expressly reserved all claims which Millsap expressly acknowledged. [R. 420, Amendment at ¶ E.]

CCD does not argue that its members never agreed to reinstatement of Millsap's right to retire under the Operating Agreement. Clearly, the Amendment contemplated that if Millsap met certain obligations his rights would be restored. [R. 419-420, Amendment at ¶ C.] On the other hand, nowhere in the Amendment does it state that Newman, Stanley or CCD would not seek to enforce any rights they have to expel or otherwise prohibit Millsap from enforcing any rights he may have under the Amended Operating Agreement if he breached the agreement after the Amendment was signed. The Amendment is not a separate contract. Rather, as its name reflects, it was merely an amendment to the Operating Agreement. Thus, Millsap continued to owe the same duties to CCD and its other members that he owed to them prior to when the Amendment was signed. As set forth above, Millsap breached the Amended Operating Agreement by continuing to withdraw funds from the Trust Account for his personal use in violation of his agreement and fiduciary duties. A member may be expelled pursuant to Utah Code Ann. § 48-2c-710(3)(b) if the member has "willfully or persistently committed a material breach of the articles of incorporation or operating agreement or of a duty owed to the company or to the other members under Section 48-2c-807 [concerning duties of managers and members] The fact that Millsap's wrongful use of Trust Account monies from CCD continued after the Amendment was signed is not in dispute.

Second, even if this Court were to find that CCD waived its right to seek expulsion for Millsap's initial misdeeds that occurred prior to the signing of the Amendment, there is

no competent evidence to support a finding that CCD intentionally waived its right to expel Millsap for his continued breaches of the Operating Agreement after signing the Amendment. Immediately upon learning of these new wrongful acts in October 2000, CCD quickly terminated Millsap's employment. [R. 313, Newman Aff'd at ¶ 20.] Over the next several months, CCD cooperated in the investigation with the Utah Insurance Department. In May 2001, Millsap's license as an escrow agent was revoked. [R. 314, Newman Aff'd at ¶ 21.] In March 2002, Millsap plead guilty to felony charges related to his misdeeds. [R. 263-271, Statement of Defendant.] Prior to July 2001, Millsap did not seek to enforce any of the terms of the Operating Agreement against CCD.

Then on July 6, 2001, Millsap, through his counsel, sent CCD a letter demanding financial information related to the company. [R. 314, Newman Aff'd; R. 466-467, Exhibit 43.] On September 7, 2001, Millsap requested additional financial information that could be used to appraise his interest in CCD. [R. 314, Newman Aff'd; R. 469, Exhibit 44.] CCD gave Millsap the information it was required to give him. After negotiations regarding Millsap's rights failed to provide resolution, CCD filed its Complaint seeking Millsap expulsion on September 27, 2001. Moreover, Millsap did not offer any evidence to the trial court that CCD's other members were aware that he was wrongfully manipulating the Trust Account in connection with the Gren Account and the Tippetts Closing. Consequently, his claim that CCD waived the right to enforce the Amendment's prohibition against him signing checks drawn on the Trust Account is unfounded inasmuch as waiver requires a knowing and intentional relinquishment of a known right. *See Webb*, 804 P.2d at 552. Instead, the record shows that immediately after Newman and Stanley discovered these new breaches, Millsap's

employment with CCD was terminated. There is simply no competent evidence to support a finding that CCD intentionally waived its rights to seek Millsap's expulsion. Therefore, this Court should reject Millsap's argument that CCD has waived its right to expel him from the company as a member.

2. THE TRIAL COURT CORRECTLY INTERPRETED THE UTAH REVISED LIMITED LIABILITY ACT WHEN IT EXPELLED MILLSAP AS A MEMBER OF CCD.

The trial court correctly interpreted the Act's expulsion provision codified at Utah Code Ann. § 48-2c-710 when it judicially expelled Millsap as a member of CCD. Millsap argues that the trial court misinterpreted the expulsion statute because he argues his alleged voluntarily retirement immediately ended his membership in CCD. He argues, therefore, that because the statutory expulsion scheme set forth in the Act applies only to "members", he could not be expelled because his membership ceased at the moment he gave notice of his retirement. Millsap's argument focuses on a hyper-technical interpretation of the word "member" and fails to consider the entire context and obvious purpose of the expulsion provision in the Act. This Court should uphold the trial court's finding that under the facts of this case the legislature intended to provide a company the right to expel a member.

A. Fundamental Principles of Statutory Interpretation Require That CCD Have the Ability to Expel Millsap under These Facts.

Under the facts of this case the Act should be interpreted to grant CCD the right to expel Millsap as a member to preclude him from participating in the company and attempting to dissolve it. "One of the cardinal principles of statutory construction is that the courts will look to the reason, spirit, and sense of the legislation, as indicated by the entire context and

subject matter of the statute dealing with the subject.” *Mountain States Tel. & Tel. Co. v. Payne*, 782 P.2d 464, 466 (Utah 1989) (citation omitted). “When doubt or uncertainty exists as to the meaning or application of an act's provisions, an analysis of the act in its entirety should be undertaken and its provisions harmonized in accordance with the legislative intent and purpose.” *See Craftsman Builder's Supply v. Butler Mfg.*, 974 P.2d 1194, 1202 (Utah 1999). While statutes must be interpreted according to their plain language, as cited by Millsap, hyper-technical readings that result in “unreasonable confused, inoperable, or blatant contradiction of the express purpose of the statute” are rejected by Utah courts. *O'Keefe v. Utah State Ret. Bd.*, 956 P.2d 279, 281 (Utah 1998) (*quoting Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 590 (Utah 1991)). As the Utah Supreme Court expressed in *In re Marriage of Gonzalez*, “[E]mphasis of only certain words in the statute ignores a fundamental principle of statutory construction, that ‘terms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion.’” 1 P.3d 1074, 1079 (Utah 2000) (*quoting Morton Int'l, Inc. v. Auditing Div. of Utah State Tax Comm'n*, 814 P.2d 581, 591 (Utah 1991); *see also CP Nat'l Corp. v. Public Serv. Comm'n*, 638 P.2d 519, 523 (Utah 1981) (holding that statutes are interpreted in light of their association with surrounding words and phrases).

CCD and Millsap are apparently in agreement that Millsap is no longer a member of CCD. Millsap takes the position that he is no longer a member by virtue of his alleged retirement, and CCD contends he is no longer a member by virtue of the trial court's expulsion order finding that he materially breached the Amended Operating Agreement. CCD and Millsap, however, differ on what rights Millsap had prior to the judicial

determination expelling him from CCD. Millsap, even though he admits he is no longer a member, wishes to enforce the terms of the Operating Agreement that force CCD's remaining members into a Hobson's choice – either pay Millsap cash for his interest in CCD and thereby cripple the business or be forced to dissolve and liquidate the company. Millsap is thus attempting to leverage his wrongful use of Trust Account funds to enable him to lay his hands on CCD's assets by dissolving it, or alternatively forcing its remaining members to purchase his interest.²

Even though Millsap argues that he is no longer a member of CCD, he hopes to enforce the terms of the Operating Agreement against CCD. Thus, Millsap argues that under the Act he has the right to retire and force dissolution regardless of his misdeeds, while the trial court found that the legislature intended to cut off any rights of a member who materially breaches an operating agreement through an expulsion proceeding.

Millsap's reading of the Act must fail because the intent of the legislature is clear when the entire statutory scheme is analyzed. The stated purpose of the expulsion provision is to prevent members who engage in wrongful acts from participating in the affairs of the business. Section 48-2c-708 recognizes that a member ceases to be such in several ways, including by death, incapacity, assignment, expulsion or voluntarily withdrawal. Of these, expulsion is the only means by which a limited liability company may choose to terminate

²In this case, Millsap seeks to enforce his alleged rights as a retiree under the Operating Agreement. Millsap has caused significant damage to CCD, wrongfully misused hundreds of thousands of dollars, and plead guilty to his crimes. Under such circumstances, the legislature could not have intended to allow him to force the other members of CCD to buy his interest or force a liquidation of the company. [R. 589, Conclusions of Law.]

a member's interest for misdeeds. While membership status also terminates for incapacity or withdrawal, for example, the member or his or her representative continues to have the rights to enforce the operating agreement. The difference between expulsion and the other means for terminating membership is that the company can force expulsion to protect itself against a member who has proven to be untrustworthy or harmful to the business.

The expulsion provision contained in the Act provides as follows:

A member of a company may be expelled:

(3) on application by the company or another member, by judicial determination that the member:

(a) engaged in wrongful conduct that adversely and materially affected the company's business; [or]

(b) has willfully or persistently committed a material breach of the articles of organization or operating agreement or of a duty owed to the company or to the other members under Section 48-2c-807 [concerning duties of managers and members] . . .

UTAH CODE ANN. § 48-2c-710. Thus, a company may seek to expel a member for conduct that materially or adversely affects the company's business or for material breaches of the operating agreement. The provision provides a means by which a company can eliminate a member's right to participate and exercise rights under an operating agreement.

Nowhere in the statutory framework does it provide when the expulsion becomes effective. The language merely requires an application for expulsion. Strong policy considerations support a finding that a member loses his ability to enforce his rights as a member as soon as those acts occur, because if he or she is acting wrongfully, they should not be allowed to continue to run the company and have their acts adversely impact the

innocent members.³ [Transcript of June 2, 2002 Summary Judgment Hearing (“Tr.”) at 28.] Finding that the date of expulsion should be the date the complaint was filed or the date of the order of expulsion would only leave innocent members subject to the member acting wrongfully, to the vagaries of the timing of the filing of the complaint or the timing of when a decision has been made by the trial court.⁴

Contrary to Millsap’s claim that his expulsion is an attempt to secure his “share of the company for the personal gain of the other members,” once a member is expelled, the member only possess the rights of an assignee, which terminates all rights the member may have as a member or manager. [Millsap Brief at 28.] “A person who is a member of a company ceases to be a member of the company and the person or the person’s successor in interest attains the status of an assignee as set forth in Section 48-2c-1102” *See* UTAH CODE ANN. § 48-2c-708. Consistently, UTAH CODE ANN. § 48-2c-1102 defines the rights of an assignee as follows:

An assignment of an interest in a company does not entitle the assignee to participate in the management and affairs of the company or to vote or to

³The trial court found as follows: “Counsel, under the facts of this case, and this is my finding, that this is not necessarily fact intensive. I find that Mr. Millsap’s resignation is a nullity under the facts of this case because of the intentional misuse of the trust account. I cannot imagine that the legislature contemplated under this fact scenario that someone could retain their membership rights under any circumstances. That’s really what my reasoning is. And it has nothing to do with other than the existence of the statute, the creation of the statute and where it is. And what I see a very strong public policy argued it that would basically strip Mr. Millsap of rights that he would otherwise have if he had not gotten himself in such a terrible circumstance. That’s my reasoning.” [Tr. 28.]

⁴Millsap argues that under CCD’s interpretation of the Act, that a member could be expelled for conduct that occurred 25 years previously. This is not so. A statute of limitations would clearly bar any such stale claims.

become a member or to exercise any rights of a member or manager. An assignment only entitles the assignee to receive, to the extent assigned, any share of profits and losses and distributions to which the assignor would be entitled.

(emphasis added). Moreover, Section 48-2c-1101 expressly provides that “An assignment of an interest in a company does not of itself dissolve the company.” Consequently, the purpose of the expulsion provision of the Act is to enable the company and other members who did not participate in the wrongful conduct to continue in business, as originally contemplated when the business began, unfettered by the participation of the member who engaged in wrongful conduct. This policy is in effect an expression of the first to breach rule discussed below, where a breaching party cannot enforce the terms of an agreement to which he or she is a party. Indeed, a basis for expulsion is the offending member’s willful “material breach of the . . . operating agreement” UTAH CODE ANN. § 48-2c-710(3)(b).

The facts of Millsap’s misappropriation of over \$625,000 from the CCD Trust Account and his continued material breaches of the Amended Operating Agreement are not disputed in this case. Specifically, the following facts are not in dispute: Millsap misappropriated over \$625,000 from the Trust Account for the development of the Pheasant Meadow Property in which he held an ownership interest; after signing the Amendment, he again misused and misappropriated monies from the Trust Account for his personal gain; thereafter his employment with CCD was terminated; his escrow license was revoked by the Department of Insurance; and he was charged and plead guilty to five felony counts of unlawful dealing of property by a fiduciary. [R. 476, 478-479, Response to CCD’s Statement of Undisputed Facts at ¶¶ 4, 11, 12, and 15.] Millsap’s wrongdoing undisputably justifies

expulsion under the Act. As long as a court finds facts meeting the criteria of wrongdoing set forth therein, expulsion is appropriate regardless of any attempt by Millsap to retire after his misdeeds were discovered.

Millsap argues, however, that his voluntarily retirement trumps a company's right to seek expulsion because only a "member" can be expelled. He claims that when he submitted his notice of retirement, he immediately ceased to be a member, and therefore, he cannot be expelled since he is no longer a member. The Act defines a "member" as a "person with an ownership interest in a company and with the rights and obligations specified under this chapter." UTAH CODE ANN. § 48-2c-102(14) (emphasis added). Under this definition and the statutory framework set forth above, Millsap's membership in CCD ceased when he lost his rights by misappropriating monies from the Trust Account in violation of the Amended Operating Agreement. Thus, while Millsap was not officially expelled as a member until the judicial determination was made by the trial court, he no longer possessed the rights of a "member" after his breaches of the Amended Operating Agreement.

Millsap analogizes his situation *vis a vis* CCD to a tenant who has already vacated the premises. How can a tenant who no longer lives in an apartment be evicted, he quires? That, however, is not the case here. A landlord could not evict a tenant who has already vacated the premises because the eviction is moot. The tenant no longer occupies the premises. There is nothing moot, however, about Millsap's desire to make continued demands on CCD. By analogy, Millsap claims that even though he does not live in the apartment, he still has the keys to the door and he can keep others from occupying the premises. Indeed, Millsap

wants to destroy the entire premises by causing a dissolution of CCD. As explained, CCD has the statutory right to stop Millsap's demands on the company by seeking his expulsion.

Indeed, the expulsion provision is not limited to ending Millsap's membership in CCD – it is also aimed at preventing him from exercising his rights under the Amended Operating Agreement. If a member could simply withdraw once his wrongdoing is discovered, he could force the company into dissolution through his continued exercise of rights under the operating agreement. Withdrawal under the statute is predicated on “happening of events specified in and in accordance with the articles of organization or operating agreement.” UTAH CODE ANN. § 48-2c-709. The legislature's clear purpose in providing a means of expulsion was to terminate a member's rights under an operating agreement, relegating them to the status of an assignee. *See* UTAH CODE ANN. § 48-2c-1102. Thus, while Millsap maintains his interest in CCD as an assignee with his proportionate ownership interest in the company, he loses the right to participate in the management of the company or to enforce his rights under the Amended Operating Agreement as a result of his wrongful conduct.

If Millsap's argument is accepted, any member whose acts constitute grounds for expulsion under the Act could avoid that remedy by voluntarily withdrawing to escape being relegated to the status of an assignee. Millsap's reading of the statute would have this Court insert a condition that a member may be expelled for wrongful conduct, *unless that member withdraws from the company first*. The explicit purpose of the expulsion statute allows a company that has been injured by a member to cut off all rights that member has to make demands upon the company that would impair the nonoffending members' ability to continue to conduct business. Interpreting the Act in such a way that allows a member's alleged

voluntary retirement to trump a company's right to seek expulsion guts Section 48-2c-710, making the right to expel a member meaningless.

Millsap contends that the purpose of the expulsion statute "is to provide a mechanism of evicting a member who has engaged in conduct which has and continues to disrupt and harm the company, and where this member refuses to disassociate." [Millsap Brief at 22] Millsap, however, is not disassociating himself from any of the rights under the Amended Operating Agreement. To the contrary, he continues to seek enforcement of those rights, including the right to retire and dissolve the company or force the remaining members to buy his interest. Millsap cannot be trusted as fully explained above. Now that he cannot participate because he is untrustworthy, he wants the company dissolved. Expulsion will prevent him from meddling in the business affairs of the company, by preventing him from causing it to cease to exist.

Fundamental rules of statutory construction require that courts interpret statutes with the "reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject." *Mountain States Tel. & Tel. Co.*, 782 P.2d at 466. When viewed in the entire context of the Act, the statutory framework simply does not support the conclusion advocated by Millsap. The legislature could not have intended Millsap's alleged retirement to preempt CCD's right to seek his expulsion for material breaches of the Operating Agreement and Amendment. This Court, therefore, should uphold the trial court's ruling expelling Millsap as a member of CCD.

B. The Timing of Millsap's Alleged Retirement and the Filing of a Complaint for Expulsion Are Irrelevant.

Millsap quibbles with the trial court's oral statement during the hearing on the summary judgment motions that his expulsion was effective at the moment Millsap committed his wrongful acts.⁵ The Findings of Fact and Conclusions of Law entered by the Court, which are determinative for purposes of this appeal, provide that under the facts of this case, where Millsap submitted his notice of retirement after the Complaint seeking his expulsion was filed, CCD was entitled to an order expelling Millsap as a member.

Millsap's argument that his retirement was effective the moment he sent the letter of retirement fails to consider the rights conveyed by the Utah legislature to CCD by the expulsion provision. Millsap submits that the trial court's ruling encourages "races to the courthouse" because the ruling concentrated on the timing of the filing of the Complaint. The trial court's ruling, however, found only under the facts of this case that CCD was entitled to an order expelling Millsap.⁶ [Tr. 28-30, R. 589.]

Even if Millsap would have sent his notice of retirement prior to the filing of CCD's Complaint, CCD's right to seek expulsion would not have been preempted. Indeed, the

⁵Even though what the Court stated was that his expulsion would be effective at the moment he committed his wrongful acts, what the Court probably intended, and what is consistent with the Act's construction, is that Millsap lost his right to enforce the terms of the Operating Agreement and Amendment immediately upon commission of his wrongful acts. [Tr. at 30.]

⁶This Court can sustain the trial court's ruling granting summary judgment in favor of CCD "on any legal ground or theory apparent from the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action" *Bailey v. Bayles*, 52 P.3d 1158, 1161 (Utah 2002).

legislative scheme set forth above provides a clear right to seek expulsion whenever a member's acts meet the requirements of Utah Code Ann. § 48-2c-710. A company must have a reasonable opportunity to seek expulsion where a member is wrongfully seeking to enforce rights under the operating agreement. Creating a race to the courthouse or the mailbox is surely not what the legislature intended. Rather, a reasonable interpretation of the statutory framework requires that where a member commits material breaches of an operating agreement that justify his expulsion, a company should be entitled to seek his expulsion to prevent the exercise of those rights.⁷ Similarly, until a judicial determination is made pursuant to 48-2c-710, a member should be prevented from withdrawing or forcing an immediate liquidation of the company. Otherwise, a member could simply preempt a company's right to seek expulsion by voluntarily withdrawing at any point after the wrongful acts were committed. Thus, while the trial court's ruling concentrated on the facts of this case, the underlying principal is consistent with the entire legislative scheme set forth in the Act – a company has the right to seek a judicial determination of expulsion without the threat that the member may voluntarily withdraw in the meantime, rendering its right meaningless.

[Tr. 28-30.]

⁷After Millsap's additional breaches of the Amended Operating Agreement were discovered in September and October of 2000, CCD immediately terminated Millsap's employment with CCD. [R. 313, Newman Aff'd at ¶ 20.] After his termination, Millsap did not attempt to assert any rights against CCD until the summer of 2001, when he demanded financial information from CCD. CCD then moved to expel Millsap by filing the Complaint on September 27, 2001. [R. 314, Newman Aff'd at ¶¶ 23-24.]

C. The Operating Agreement's Prohibition Against Expulsion is Trumped by the Act's Expulsion Provision.

Millsap argues that the trial court's ruling guts the Act's directive that the agreement of the parties should control. Millsap submits that when consideration is given to the Amended Operating Agreement's provision prohibiting a member's expulsion and the Amendment that allegedly reinstates Millsap's rights thereunder, he cannot be expelled. Millsap's argument fails because the Act's expulsion provision admittedly overrides the Amended Operating Agreement's prohibition on expulsion, and Millsap lost the right to enforce the Amended Operating Agreement through his material breaches.

While it is true that the Act provides guidance that it should be interpreted to provide for "maximum effect to the principal of freedom of contract and to the enforceability of operating agreements of companies", UTAH CODE ANN. § 48-2c-1901; Section § 48-2c-502 of the Utah Code Ann. provides that "Where the provisions of an operating agreement conflict with the provisions of this chapter, the provisions of this chapter shall control." Additionally, Utah Code Ann. § 48-2c-120(f) expressly states that a company's articles of organization or operating agreement may not "vary the right to expel a member based on any event specified in Subsection 48-2c-710(3)." The Act was significantly amended in 2001. Some of the additions to the Act included the expulsion provision codified at Utah Code Ann. § 48-2c-710 and the prohibition against varying a company's right to seek expulsion set forth in Subsection 48-2c-120(f). Indeed the Amended Operating Agreement's prohibition against expulsion only applies to its members, not the company. Clearly, if the provision of the Amended Operating Agreement prohibits CCD itself from expelling any of

its members that provision conflicts with the 2001 amendments to the Act providing the right of expulsion. Millsap even admits that “If there had been an ongoing problem with CCD which justified the use of the expulsion statute, then unquestionably, Utah Code Ann. § 48-2c-120(f) would trump the CCD Operating Agreement insofar as it provided that there should be no expulsion of a member.” [Millsap Brief at p. 25] Thus, Section 48-2c-710 controls and the prohibition in the Amended Operating Agreement against expulsion relied upon by Millsap is void.

Moreover, Millsap’s argument that this Court should give effect to the parties contractual agreement in the Amendment to reinstate Millsap’s rights under the Operating Agreement presumes that there were no material breaches of the Amended Operating Agreement. The undisputed evidence supporting the trial court’s finding of material breaches of the agreement by Millsap is set forth in detail in several places in this memorandum, and is not restated here again. Because Millsap’s reliance under the “right to contract” is based upon a faulty factual premise – *i.e.*, there are no facts justifying expulsion – his argument must be rejected.

3. THE TRIAL COURT CORRECTLY APPLIED THE FIRST TO BREACH DOCTRINE BY FINDING THAT MILLSAP COULD NOT RETIRE BECAUSE OF HIS MATERIAL BREACHES OF THE AMENDMENT AND OPERATING AGREEMENT.

As an alternative ground for summary judgment, the trial court also ruled that Millsap had no right to enforce the terms of the Amended Operating Agreement against CCD because of his material breaches of both agreements. [R. 589, Conclusions of Law at ¶ 1.] While the first to breach rule is based upon a longstanding common law doctrine, it is entirely

consistent with the Act's statutory scheme set forth above that prevents a member from exercising rights under an operating agreement after materially breaching that agreement. Millsap's abuse of the Trust Account clearly constitutes a material breach of the prohibition against using company property for personal reasons, engaging in acts detrimental to CCD and violates the express prohibition contained in the Amendment that he had no authority to withdraw funds from the Trust Account.

This Court has long recognized that

As a rule, a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. **He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform.** . . . It has also been said that where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom rests all the liability for the nonperformance.

Jackson v. Rich, 499 P.2d 279, 280-281 (Utah 1972) (emphasis added); *quoting* 17 *Am.Jur.2d*, Contracts § 365; *see also Young Elec. Sign Co. v. Vetas*, 564 P.2d 758, 759 (Utah 1977) (reciting rule that one who materially breaches a contract cannot enforce performance against another); *Fisher v. Taylor*, 572 P.2d 393, 395 (Utah 1972) (finding that party who first breached contract cannot complain of later breach by the other party); *see also Industrial Constr. v. State*, 1978 Utah Lexis 1186 (Utah) (finding that failure to performance essential part of a contract was a material breach).

Here, Millsap materially breached the Amended Operating Agreement because his breach of trust cuts to the very heart of his obligations to CCD. Millsap was entrusted with running the affairs of CCD. When his first misappropriations of Trust Account funds were discovered, Newman and Stanley agreed to give Millsap a second chance by signing the

Amendment. By continuing to misuse Trust Account funds after signing the Amendment, however, Millsap lost his right to enforce the terms of that agreement against CCD and he is barred from asserting any rights thereunder. Moreover, after the Amendment was signed Millsap's escrow license was revoked and he plead guilty to five felony counts of misusing funds deposited into the Trust Account. Therefore, Millsap cannot rely on the Amendment as a basis that his right to retire was reinstated, or that CCD waived the right to expel him as a member of CCD. Inasmuch as he cannot enforce the Amendment, his misconduct that occurred prior to the time the Amendment was signed, is an independent basis for his expulsion. Pursuant to the first to breach doctrine and consistent with the statutory framework, Millsap lost his right to enforce the terms of the Amended Operating Agreement against CCD when he materially breached that agreement by misappropriating Trust Account funds both before and after signing the Amendment.

4. MILLSAP'S ALLEGATIONS OF BAD FAITH BY CCD ARE NOT SUPPORTED BY ANY EVIDENCE OR HIS CONTINUED OWNERSHIP AS AN ASSIGNEE.

Millsap argues the trial court erred in granting CCD's motion for summary judgment because CCD's motive for expelling him was in bad faith. Millsap submits that CCD's expulsion claim is essentially a grab for his money, intended to divest him of his interest in CCD for the benefit of its other members. [Millsap Brief at 26-28.] Additionally, Millsap submits that Newman and Stanley acted in bad faith when they allegedly presented him with a choice of walking away from CCD or being turned over to the authorities. [Millsap Brief at 10, ¶¶ 14-16.] Millsap's argument that CCD acted in bad faith is unfounded and there is no evidence to support his spurious allegation.

First, there is no evidence to support Millsap's claim of bad faith. Millsap refers to the minutes of a meeting held on October 25, 2000, wherein Millsap's wrongful conduct was discussed. [R. 491, which is a copy of the minutes.] Millsap argues that these minutes prove that Newman and Stanley were only interested in obtaining Millsap's ownership interest in CCD. Nothing in these minutes, however, supports such an outlandish conclusion. Rather, the minutes simply reflect that the parties discussed a "quiet parting of the ways", a potential non compete agreement, an indemnification agreement, and Millsap's separation from CCD. Thus, there is absolutely no evidence that could support a finding that Newman and Stanley have exercised any of their rights in bad faith. [R. 491.]

Second, Millsap misinterprets the effect of his expulsion. As explained above, Section § 48-2c-708 provides an expelled member receives the rights of an assignee. Section § 48-2c-1102 states an assignee has no authority to participate in the management of the business, but he continues to "any share of the profits and losses and distributions to which the assignor would be entitled." Here, Millsap's expulsion does not provide any financial benefit to the other members of CCD, because Millsap continues to own his one third interest in CCD. The expulsion statute was created for just such a situation – to prohibit a member who engaged in wrongful conduct from participating in the company's business and exercising rights under an operating agreement. Upon expulsion, Millsap loses the right to participate in the business, having the rights only of an assignee.

The case of *Lawlis v. Kightlinger & Gray*, relied upon by Millsap, is particularly instructive on this score. 562 N.E.2d 435 (Ind. Ct. App. 1990). In *Lawlis*, a law partnership expelled a senior partner who had problems with alcoholism. Instead of immediately

expelling him, the law firm gave the partner a second chance. After the partner began to make additional demands on the partnership, the partners voted to expel him. The expelled partner sued claiming, inter alia, that he was expelled in bad faith. The *Lawlis* court rejected the partners' claim finding that "good faith" in such a situation is defined as "a state of mind indicating honest lawfulness of purpose: belief in one's legal title or grant: belief that one's conduct is not unconscionable . . . : absence of fraud, deceit, collusion, or gross negligence. . . ." *Id.* at 443. Thus, because the partners were simply exercising their rights to expel the partner, their actions could not be bad faith as a matter of law. *Id.* The court explained valid justifications for expulsion in a partnership as follows:

[T]he prime generators of . . . lifeblood [of a partnership] are good will and a favorable reputation. . . . Any condition which has the potential to adversely affect the good will or favorable reputation of a law partnership is one which potentially involves the partnership's economic survival. Thus, if a partner's propensity toward alcohol has the potential to damage his firm's good will or reputation for astuteness in the practice of law, simple prudence dictates the exercise of corrective action, . . . since the survival of the partnership itself potentially is at stake.

Id. at 442; see also Paula Dalley, Article: *The Law of Partner Expulsions: Fiduciary Duty and Good Faith*, 21 Cardozo L. Rev. 181, 201 (1999) ("An expulsion right is exercised in good faith when it is done for a purpose within the contemplation of the parties, such as to protect partners from a partner who has become untrustworthy or to remove a partner who has made the cooperative operation of the business impossible. . . .")

Similarly, in this case, CCD gave Millsap a second chance. After signing the Amendment, however, he continued to misuse the Trust Account for his own benefit, his escrow license was revoked by the Department of Insurance, additional undisclosed misdeeds

came to light, and he plead guilty to five felonies related to his misdeeds. Moreover, CCD's business, much like a law firm, is based on goodwill, a favorable reputation, and the trust of its clients. Millsap's wrongful acts clearly threatened the good will and reputation of CCD. Like *Lawlis*, there are simply no facts that could support a finding that CCD was acting in bad faith outside of its legal rights to seek Millsap's expulsion.

On the other hand, Millsap's notice of retirement is clearly an attempt to deliver the final blow to CCD and its other members. After all of his admitted wrongful acts, Millsap seeks to force CCD to buy-out his interest, or in the alternative, to dissolve CCD and liquidate its assets. Millsap's fraudulent acts have harmed CCD's good will. It is undisputed that even after being given a second chance, Millsap failed to observe the terms of the Amended Operating Agreement. Given these undisputed facts, it is amazing that Millsap would claim CCD acted with bad faith by exercising its statutory rights under the Act to prevent his continued participation in CCD's business. Thus, Millsap's argument that CCD, Newman or Stanley have acted in bad faith should be rejected.

5. IN ANY EVENT, DISPUTED ISSUES OF FACT PRECLUDE SUMMARY JUDGMENT IN FAVOR OF MILLSAP.

Should this Court for any reason find that the trial court improperly granted summary judgment in favor of CCD, summary judgment cannot be granted in favor of Millsap because issues of fact remain as to whether or not he fraudulently induced Newman and Stanley to enter into the Amendment. As a separate and alternative ground for summary judgment, CCD argued that the Amendment was ineffective because Millsap had fraudulently induced the members of CCD to enter into the Amendment. Millsap concedes that his handwritten

accounting improperly gives himself at least \$11,000 in credits. [R. 477-478, Millsap's Responses to CCD's Statement of Undisputed Facts at ¶ 8.] CCD argued that Millsap intentionally misrepresented that his accounting was an accurate reflection of the monies he had misappropriated and returned to the Trust Account. The trial court found, however, that there were disputed issues with regard to Millsap's intent. [R. 589, Conclusions of Law at ¶ 5.]

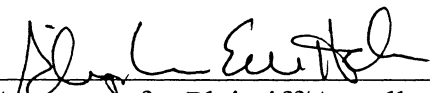
Additionally, if the Court finds that there are disputed issues of fact as to whether or not CCD waived any of its rights to expel Millsap, likewise, CCD is entitled to a factual determination of those issues by the trial court. Thus, in any event, this Court cannot grant summary judgment in favor of Millsap because there are disputed issues of fact that preclude summary judgment in Millsap's favor and CCD is entitled to a determination of these factual issues at trial.

VIII. CONCLUSION.

In conclusion the trial court's ruling should be upheld. Millsap materially breached the Amended Operating Agreement. Consequently, any prohibition against expulsion and right to retire are barred. Millsap materially breached the Amended Operating Agreement and his wrongful acts adversely and materially impacted CCD's business. Moreover, Millsap did not timely offer any evidence that CCD's members were aware he was signing checks and in any event he did not offer any evidence that they were aware that he was wrongfully misusing the Trust Account after the Amendment was signed. Millsap, therefore, was properly expelled as a member of CCD and the judgment entered by the trial court should be upheld.

DATED this 9th day of September, 2003.

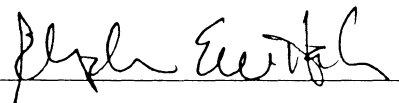
PARR WADDOUPS BROWN GEE & LOVELESS
Stephen E. W. Hale
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By: 
Attorneys for Plaintiff/Appellee CCD, L.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2003, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE CCD, L.C.**, to be mailed by first class U.S. mail, postage prepaid, to the following:

James C. Bradshaw, Esq.
Ann Marie Taliaferro, Esq.
10 West Broadway, Suite 210
Salt Lake City, Utah 84101



ADDENDUM

TO

BRIEF OF APPELLEE CCD, L.C.

Tab A

48-2c-120. Articles of organization and operating agreement.

- (1) A company's articles of organization or operating agreement may not:
 - (a) restrict a right to inspect and copy records under Section 48-2c-113;
 - (b) reduce the duties of members or managers under Section 48-2c-807;
 - (c) eliminate the obligation of good faith and fair dealing, except that the members by written agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;
 - (d) vary any filing requirement under this chapter;
 - (e) vary any requirement under this chapter that a particular action or provision be reflected in a writing;
 - (f) vary the right to expel a member based on any event specified in Subsection 48-2c-710(3);
 - (g) vary the remedies under Section 48-2c-1210 for judicial dissolution of a company;
 - (h) except as allowed by Section 48-2c-1103 or any other provision of law, restrict rights of, or impose duties on, persons other than the members, their assignees and transferees, the managers, and the company, without the consent of those persons; or
 - (i) eliminate or limit the personal liability of a manager to the company or its members for damages for any breach of duty in the capacity where a judgment or other final adjudication adverse to the manager establishes that the manager's acts or omissions were in bad faith or involved gross negligence or willful misconduct or that the manager personally gained a financial profit or other advantage to which the manager was not legally entitled.
- (2) The articles of organization and operating agreement may:
 - (a) vary the requirement under Section 48-2c-1104 that, if all of the other members of the company other than the member proposing to dispose of the member's interest do not approve of the proposed transfer or assignment by unanimous written consent, the transferee of the member's interest shall have no right to participate in the management of the business or affairs of the company or to become a member; and
 - (b) vary the requirement under Section 48-2c-703 that, after the filing of the original articles of organization, a person may be admitted as an additional member only upon the written consent of all members.

History: C. 1953, 48-2c-120, enacted by L. 2001, ch. 260, § 27.

Effective Dates. — Laws 2001, ch. 260, § 197 makes the act effective on July 1, 2001.

48-2c-502. General rules for operating agreements.

(1) Except as provided in Subsection 48-2c-120(1), or in the articles of organization, an operating agreement may modify the rules of any provision of this chapter that relates to:

- (a) the management of the company;
- (b) the business or purpose of the company;
- (c) the conduct of the company's affairs; or
- (d) the rights, duties, powers, and qualifications of, and relations between and among, the members, the managers, the members' assignees and transferees, and the company.

(2) Where the provisions of an operating agreement conflict with the provisions of this chapter, the provisions of this chapter shall control. Where the provisions of an operating agreement conflict with the articles of organization, the articles of organization shall control except to the extent the articles of organization conflict with the provisions of this chapter.

History: C. 1953, 48-2c-502, enacted by L. 2001, ch. 260, § 67.

Effective Dates. — Laws 2001, ch. 260, § 197 makes the act effective on July 1, 2001.

(1) A person who is a member of a company ceases to be a member of the company and the person or the person's successor in interest attains the status of an assignee as set forth in Section 48-2c-1102, upon the occurrence of one or more of the following events:

(a) the death of the member, except that the member's personal representative, executor, or administrator may exercise all of the member's rights for the purpose of settling the member's estate, including any power of an assignee and any power the member had under the articles of organization or operating agreement;

(b) the incapacity of the member, as defined in Subsection 75-1-201(22), except that the member's guardian or conservator or other legal representative may exercise all of the member's rights for the purpose of administering the member's property, including any power of an assignee and any power the member had under the articles of organization or operating agreement;

(c) the member withdraws by voluntary act from the company as provided in Section 48-2c-709;

(d) upon the assignment of the member's entire interest in the company;

(e) the member is expelled as a member pursuant to Section 48-2c-710;

or

(f) unless otherwise provided in the operating agreement, or with the written consent of all other members:

(i) at the time the member:

(A) makes a general assignment for the benefit of creditors;

(B) files a voluntary petition in bankruptcy;

(C) becomes the subject of an order for relief in bankruptcy proceedings;

(D) files a petition or answer seeking for the member any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation;

(E) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the member in any proceeding of the nature described in Subsections (1)(f)(i)(A) through (D); or

(F) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the member or of all or any substantial part of the member's properties;

(ii) 120 days after the commencement of any proceeding against the member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within 90 days after the appointment without his or her consent or acquiescence of a trustee, receiver, or liquidator of the member or of all or any substantial part of the member's properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any stay, the appointment is not vacated;

(iii) in the case of a member that is another limited liability company, the filing of articles of dissolution or the equivalent for that company or the judicial dissolution of that company or the administrative dissolution of that company and the lapse of any period allowed for reinstatement;

(iv) in the case of a member that is a corporation, the filing of articles of dissolution or the equivalent for the corporation or the administrative dissolution of the corporation and the lapse of any period allowed for reinstatement; or

(v) in the case of a member that is a limited partnership, the dissolution and commencement of winding up of the limited partnership.

(2) The articles of organization or operating agreement may provide for other events the occurrence of which result in a person's ceasing to be a member of the company.

48-2c-709. Withdrawal of a member.

A member may withdraw from a company at the time or upon the happening of events specified in and in accordance with the articles of organization or operating agreement. If the articles of organization or operating agreement do not specify the time or the events upon the happening of which a member may withdraw, a member may not withdraw prior to the dissolution and completion of winding up of the company, without the written consent of all other members at the time.

History: C. 1953, 48-2c-709, enacted by L. 2001, ch. 260, § 85.

Effective Dates. — Laws 2001, ch. 260, § 197 makes the act effective on July 1, 2001.

48-2c-710. Expulsion of a member.

A member of a company may be expelled:

- (1) as provided in the company's operating agreement;
- (2) by unanimous vote of the other members if it is unlawful to carry on the company's business with the member; or
- (3) on application by the company or another member, by judicial determination that the member:
 - (a) has engaged in wrongful conduct that adversely and materially affected the company's business;
 - (b) has willfully or persistently committed a material breach of the articles of organization or operating agreement or of a duty owed to the company or to the other members under Section 48-2c-807; or
 - (c) has engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member.

History: C. 1953, 48-2c-710, enacted by L. 2001, ch. 260, § 86.

Effective Dates. — Laws 2001, ch. 260, § 197 makes the act effective on July 1, 2001.

48-2c-1102. Rights of assignee.

An assignment of an interest in a company does not entitle the assignee to participate in the management and affairs of the company or to vote or to become a member or to exercise any rights of a member or manager. An assignment only entitles the assignee to receive, to the extent assigned, any share of profits and losses and distributions to which the assignor would be entitled.

History: C. 1953, 48-2c-1102, enacted by
L. 2001, ch. 260, § 111.

Effective Dates. — Laws 2001, ch. 260, §
197 makes the act effective on July 1, 2001.

48-2c-1901. Legislative intent — Freedom of contract.

It is the intent of the Legislature that this chapter be interpreted so as to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements of companies.

History: C. 1953, 48-2c-1901, enacted by
L. 2001, ch. 260, § 192.

Effective Dates. — Laws 2001, ch. 260, §
197 makes the act effective on July 1, 2001

Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Amended effective November 1, 1997.)

Tab B

39619

DATE April 25, 2000

DOLLARS

[Handwritten Signature]
AUTHORIZED SIGNATURE

14-00000 450000

03/11/02 MON 13 00 [TX/RX NO 7009]

Tab C

UNITED TITLE SERVICES
TRUST ACCOUNT
229 E. ST. GEORGE BLVD., SUITE 200
ST. GEORGE, UTAH 84770

ZIONS FIRST NATIONAL BANK
ST. GEORGE OFFICE 40 EAST ST. GEORGE BLVD.
ST. GEORGE, UTAH 84770 1-800-788-2285

42600

31-5/1240
34

DATE October 2, 2000

PAY TO THE
ORDER OF PAT DIXON

\$ 81,271.91

EIGHTY ONE THOUSAND TWO HUNDRED SEVENTY ONE AND 81/100

DOLLARS

PAT DIXON
211 NORTH 200 WEST
KANAB, UT 84761

[Signature]
AUTHORIZED SIGNATURE

MEMO

11056 LB PAYOFF & RELEASE TRUST DEED

"04 2600" 121240000540 034 13456 8"

UNITED TITLE SERVICES

PAYOFF & RELEASE TRUST DEED

81,271.91

42600

Date: 10/2/00

NET AMOUNT:

81,271.91

Payee: PAT DIXON
Property: 1803 WEST 1300 NORTH ST. GEORGE UT 84770
Buyer: TIPPETTS, NILTON L. Seller: REYNOLDS-FORD, SHELLEY
Closer: LB FileNo: 11056 Escrow: 11056

*Copy to send
to Craig.
as per Chris*

Tab D

Gren Trust Deed. Funds disbursed to Gren Development pursuant to the Loan were drawn upon the Trust Account by check number 38732 ("First Gren Check"). *Exhibit 27* is a copy of the First Gren Check. In connection with the Loan CCD issued a policy of title insurance, number 4809-A-40, insuring the validity of the Gren Trust Deed. On April 5, 2000, Mr. Millsap caused \$60,000 to be deposited into the Trust Account under the Gren Account Number, the same number used in connection with the Loan. Attached as *Exhibits 28 and 29* are copies of the deposit slip dated April 4, 2000 and the related cashier's check, number 61-138632094 in the amount of \$60,000 ("Cashier's Check") respectively. The Cashier's Check bears Mr. Millsap's hand writing which states "not secured." On April 5, 2000 Mr. Millsap caused check number 39203 to be drawn upon the Trust Account made payable to Gren Development ("Second Gren Check"). Attached as *Exhibit 30* is a copy of Second Gren Check. The Second Gren Check is endorsed by Mr. Millsap. On April 25, 2000, \$45,000 was transferred into the Trust Account by wire transfer to be deposited into the Trust Account under the Gren Account Number, the number used in connection with the Loan. *Exhibits 31 and 32* are copies of the deposit slip and the bank wire transfer documentation respectively. On April 25, Mr. Millsap caused check number 39619 to be drawn upon the Trust Account made payable to Gren Development ("Third Gren Check"). Attached as *Exhibit 33* is a copy of Third Gren Check. The Third Gren Check is endorsed by Mr. Millsap. It is against CCD's policy to use the same account number for different transactions such as the forgoing.

19. On September 29, 2000, the sale of real estate ("Ford Property") by Shelly Reynolds-Ford to Milton L. Tippetts was closed ("Tippetts Closing") at CCD's offices. Attached as *Exhibit 34* is a copy of the Settlement Statement ("Statement") related to the Tippetts Closing. Pat Dixon held a deed of trust ("Dixon Trust Deed") that encumbered the Ford Property. *Exhibit 35* is a copy of Schedule A to the commitment of title insurance ("Commitment") CCD issued in connection with the Tippetts Closing that shows the existence of the Dixon Trust Deed. Line 504 of the Statement

shows that \$81,281.91 was to be disbursed to Pat Dixon from the sales proceeds. Mr. Millsap caused check number 42600 in the amount of \$81,271.91 ("First Check") to be prepared in connection with that closing. He signed the First Check. Attached as *Exhibit 36* is a copy of the First Check. The First Check was sent to me to induce me to execute a reconveyance of the Dixon Trust Deed inasmuch as United Title Services of Utah, Inc., of which I am the owner, was the trustee of the Dixon Trust Deed. The First Check was sent to me by facsimile on October 3, 2000. At the same time the First Check was sent to me a copy of the First Check marked void was also sent to me by facsimile. *Exhibit 37* is a copy of the First Check that was marked void. After receiving those checks I immediately began to investigate whether Mr. Millsap was using the Trust Account in violation of the Amendment. I discovered that he voided the First Check and in its stead caused two checks to be issued, the total amount of which equaled the amount of the First Check. One of the new checks was payable to Gren Development, Mr. Millsap's company, dated October 3, 2000, in the amount of \$70,000 ("Second Check"), signed by Mr. Millsap, and the other check was payable to Pat Dixon dated October 3, 2000, in the amount of \$11,281.91 ("Third Check"), also signed by Mr. Millsap. Copies of the Second Check and the Third Check are attached hereto as *Exhibits 38 and 39* respectively.

20. I discovered Mr. Millsap's unauthorized uses of the Trust Account in connection with the Gren Account and Tippetts Closing on or about October 3, 2000. When I discovered his unauthorized uses of the Trust Account Mr. Millsap's employment with CCD was terminated on October 13, 2000. Attached hereto as *Exhibit 40* is a copy of a letter I sent to him dated November 3, 2000, advising him of his rights to health insurance coverage pursuant to COBRA. On December 12, 2000, acknowledging that his employment with CCD had been terminated, Mr. Millsap sent a letter addressed to Mr. Stanley and me requesting the continuation of his "coverage on the COBRA plan." Attached as *Exhibit 41* is a copy of his letter.

Settlement Statement

U.S. Department of Housing
and Urban Development

Type Of Loan <input type="checkbox"/> FHA <input type="checkbox"/> FmHA <input checked="" type="checkbox"/> Conv Unins <input type="checkbox"/> VA <input type="checkbox"/> Conv Ins				6 File Number 11056	7 Loan Number 181-760894-6/021-76089	8 Mortgage Insurance Case Number 46521-4662502 703
C Note This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p n c)" were paid outside the closing. They are shown here for informational purposes and are not included in the totals.						
D Name and Address of Borrower NILTON L. TIPPETTS		E Name and Address of Seller SHELLY REYNOLDS-FORD		F Name and Address of Lender FLEET MORTGAGE CORP 7250 NORTH 16TH STREET, STE 400 PHOENIX AZ 85020		
G Property Location 1803 WEST 1300 NORTH ST GEORGE UT 84770		SG-JCR-36		H Settlement Agent UNITED TITLE SERVICES, INC 87-0531426		
				Place of Settlement 229 EAST ST GEORGE BLVD SUITE #200 ST GEORGE, UT 84770		Settlement Date 9/8/00 Disbursement Date 9/11/00
J Summary of Borrower's Transaction				K Summary of Seller's Transaction		
100 Gross Amount Due From Borrower				400 Gross Amount Due to Seller		
101 Contract Sales Price		88,500.00		401 Contract Sales Price		88,500.00
102 Personal Property				402 Personal Property		
103 Settlement Charges to borrower (line 1400)		4,931.42		403		
104				404		
105				405		
Adjustments for items paid by seller in advance				Adjustments for items paid by seller in advance		
106 City/Town Taxes to				406 City/Town Taxes to		
107 County Taxes 10/3/00 to 12/31/00		100.16		407 County Taxes 10/3/00 to 12/31/00		100.16
108 Assessments to				408 Assessments to		
109				409		
110				410		
111				411		
112				412		
120 Gross Amount Due From Borrower		93,531.58		420 Gross Amount Due To Seller		88,600.16
200 Amounts paid By Or In Behalf Of Borrower				500 Reductions In Amount Due To Seller		
201 Deposit or earnest money		400.00		501 Excess deposit (see instructions)		
202 Principal amount of new loan(s)		87,776.00		502 Settlement charges to seller (line 1400)		3,455.00
203 Existing loan(s) taken subject to				503 Existing loan(s) taken subject to		
204				504 Payoff of first mortgage loan DIXON		81,271.91
205				505 Payoff of second mortgage loan		
206				506		
207				507 1999 DELQ. TAXES		438.13
208				508 STREET LIGHT INSTALLATION		150.00
209				509		
Adjustments for items unpaid by seller				Adjustments for items unpaid by seller		
210 City/Town Taxes to				510 City/Town Taxes to		
211 County Taxes 1/1/00 to 9/29/00				511 County Taxes 1/1/00 to 12/31/00		410.75
212 Assessments to				512 Assessments to		
213				513		
214				514		
215				515		
216				516		
217				517		
218				518		
219				519		
220 Total paid By/For Borrower		88,176.00		520 Total Reduction Amount Due Seller		85,725.79
300 Cash At Settlement From/To Borrower				600 Cash At Settlement To/From Seller		
301 Gross Amount due from borrower (line 120)		93,531.58		601 Gross Amount due to seller (line 420)		88,600.16
302 Less amounts paid by/for borrower (line 220)		88,176.00		602 Less reductions in amt. due seller (line 520)		85,725.79
303 Cash <input checked="" type="checkbox"/> From <input type="checkbox"/> To Borrower		5,355.58		803 Cash <input checked="" type="checkbox"/> To <input type="checkbox"/> From Seller		2,874.37

** Tax estimate based on 1999 taxes **

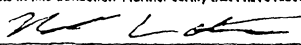
The HUD-1 settlement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.

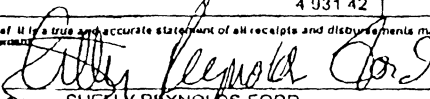
Synette Z. Buzza
Settlement Agent

9-29-00
Date

700 Brokers Commission based on price \$ 88 500 00 @ 3 % = 2,655 00		Paid From Borrower's Fund at Settlement	Paid From Seller's Fund at Settlement
701 Portion of Commission (Line 700) as follows			
655 00 to REMAX FIRST REALTY (Less \$400 00 E M Deposit)			
702 Commission paid at Settlement			2 655 00
704			
800 Items Payable in Connection With Loan			
801	Loan Origination Fee 1 % ST GEORGE FINANCIAL & INSURANCE CTR	858 45	
802	Loan Discount 0 875% ST GEORGE FINANCIAL & INSURANCE CTR	768 04	
803	Appraisal Fee to KENT VINCENT	350 00	
804	Credit Report to CREDIT BUREAU OF SO UTAH	30 00	
805	Lender's Inspection Fee to		
806	Mortgage Insurance Application Fee to		
807	Assumption Fee to		
808	TAX SERVICE FEE TO FMG \$80 00 POC BY BROKER		
809	FLOOD CERT TO FDSI	16 00	
810	UNDERWRITING FEE TO FMC \$425 00 POC BY BROKER		
811	WIRE FEE TO FMC \$20 00 POC BY BROKER		
812	BROKER PAID PROCESSING \$150 00		
813	BROKER PAID COURIER FEE \$50 00		
814			
815			
816			
817			
900 Items Required By Lender To Be Paid in Advance			
901	Interest from 10/2/00 to 10/1/00 @ \$ 19 84 /day	(19 84)	
902	Mortgage Insurance Premium for months to	1,931 51	
903	Hazard Insurance Premium for 1 years to	315 00	
904			
905			
1000 Reserves Deposited With Lender			
1001	Hazard Insurance 3 months @ \$ 26 25 per month	78 75	
1002	Mortgage Insurance months @ \$ 35 77 per month		
1003	City Property Taxes months @ \$ per month		
1004	County Property Taxes 2 months @ \$ 32 88 per month	65 76	
1005	Annual Assessments months @ \$ per month		
1006	months @ \$ per month		
1007	months @ \$ per month		
1008	AGGREGATE ACCOUNT ADJUSTMENT	(26 25)	
1100 Title Charges			
1101	Settlement or Closing Fee to UNITED TITLE SERVICES INC	100 00	100 00
1102	Abstract or Title Search to		
1103	Title Examination to		
1104	Title Insurance Binder to		
1105	Document Preparation to UNITED TITLE SERVICES INC		30 00
1106	Notary Fees to		
1107	Attorney's Fees to		
(Includes above item number)			
1108	Title Insurance to UNITED TITLE SERVICES INC	354 00	595 00
(Includes above item number)			
1109	Lender's Coverage \$ 87 776 00		
1110	Owner's Coverage \$ 88 500 00		
1111	Endorsements 8 1, 100 & 116 ENDORSEMENTS	55 00	
1112			
1113			
1200 Government Recording and Transfer Charges			
1201	Recording fee Deed \$ 20 00 Mortgage \$ 35 00 Release \$ 30 00	55 00	30 00
1202	City/County Tax Stamps Deed \$ Mortgage \$		
1203	State Tax/Stamps Deed \$ Mortgage \$		
1204			
1205			
1300 Additional Settlement Charges			
1301	Survey to		
1302	Pest Inspection to		
1303	TERMITE REPORT TO ST GEORGE FINANCIAL		45 00
1304			
1305			
1400 Total Settlement Charges (enter on line 103 Section J and 602 Section K)		4 931 42	3 455 00

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

 Borrowers: MILTON L. TIPPETTS

 Sellers: SHELLEY REYNOLDS FORD

SCHEDULE A

Order No. 11056
Direct inquiries to
DOUG STANLEY

673-7733

1. Effective Date **August 25, 2000 @ 8:00 AM**
2. Policy or Policies to be issued Amount of Insurance
 - (a) A.L.T.A. Owner's \$ 88,500.00
Fee: \$ 595.00

Proposed insured: **NILTON L. TIPPETTS and ANGELA RAMSEY**
 - (b) A.L.T.A. Lender \$ 87,776.00
Fee: \$ 354.00

Proposed insured: **ST. GEORGE FINANCIAL**
 - (c) Endorsements: **100 116 8.1** Fee: \$ 55.00
3. The estate or interest in the land described or referred to in this Commitment and covered herein is

Fee Simple
4. Title to the said estate or interest in said land is at the effective date hereof vested in:

SHELLY REYNOLDS-FORD, A MARRIED WOMAN
5. The land referred to in this Commitment is described as follows:

Lot 36, JCR MOBILE ESTATES SUBDIVISION, a Subdivision, according to the Official Plat thereof, on file in the Office of the Recorder of Washington County, State of Utah.

For informational purposes only

The **Washington County** Assessor shows the address of said property to be:

1803 WEST 1300 NORTH
ST. GEORGE, UT 84770

SCHEDULE B - SECTION 1

Order No. 11056

REQUIREMENTS

The following requirements must be met:

- (a) Pay the agreed amounts for the interest in the land and/or the mortgage to be insured.
- (b) Pay us the premiums, fees and charges for the policy.
- (c) Documents satisfactory to us creating the interest in the land and/or mortgage to be insured must be signed, delivered and recorded.
- (d) You must tell us in writing the name of anyone not referred to in this Commitment who will get an interest in the land or who will make a loan on the land. We may then make additional requirements or exceptions.

(e) INSTRUCTIONS TO CLOSING OFFICER

The following documentation is required to close and insure this transaction.

- 1. _____ Warranty deed from the vested owners on Schedule A to the proposed insured.
- 2. _____ Trust Deed to secure the new loan to be insured.
- 3. _____ Payment of Tax Sale shown as Exception No. 1.
- 4. _____ Reconveyance of Deed of Trust shown as Exception No. 6.

(f) You must give us the following information:

- 1. Any off record leases, surveys, etc.
- 2. Statement (s) of identity, all parties.
- 3. Other

Please direct any inquiries concerning any of the above requirements to Doug Stanley prior to closing this transaction.

SCHEDULE B - SECTION 2

No. 11056

EXCEPTIONS

The policy or policies to be issued will contain exceptions to the following unless the same are disposed of to the satisfaction of the Company.

PART I

- 1 Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.
- 2 Any facts, rights, interest, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof.
- 3 Easements, claims of easement or encumbrances which are not shown by the public records.
- 4 Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by public records.
- 5 Unpatented mining claims; reservations or exceptions in patent or in Acts authorizing the issuance thereof; water rights; claims or title to water.
- 6 Any lien, or right to a lien, for services, labor or material theretofore or hereafter furnished, imposed by law and not shown by the public records.

SCHEDULE B - SECTION 2

No. 11056

PART II

SPECIFIC EXCEPTIONS

09-30
\$438.13

1. A Sale to Washington County for taxes for the year 1999; amount of sale \$394.51, plus interest, penalty and costs. Entered in Tax Sale Book for the year 1999. Tax Parcel No. SG-JCR-36.
2. Taxes or Assessments which are not shown as existing liens by the Official Washington County Records. This Policy does not include a search of the Special Assessment Records of ST. GEORGE City, and Ownership of said property is subject to any Assessment by said Municipality for Curb and Gutter, Street Improvement, Sewer, Sidewalk, Water, Etc.
3. EASEMENT AS DELINEATED and/or DEDICATED ON THE RECORDED PLAT:
Purpose: Public Utilities and Drainage Easement
Affects: Over the Northerly and Southerly 7.5 feet
4. Covenants, Conditions, and Restrictions and/or Easements, Except those based on race, color, creed religion, sex, handicap, familial status, or national origin to extent such Covenants, Conditions or Restrictions violate 42 USC 3604 (C), contained in instrument.
Recorded: MARCH 24, 1975
Entry No.: 166645
Book/Page: 169/104

AMENDMENT TO SAID COVENANTS:

Recorded: OCTOBER 17, 1980
Entry No.: 221192
Book/Page: 279/223

AMENDMENT TO SAID COVENANTS:

Recorded: MARCH 12, 1981
Entry No.: 225469
Book/Page: 286/581

AMENDMENT TO SAID COVENANTS:

Recorded: MARCH 12, 1981
Entry No.: 225470
Book/Page: 286/583

AMENDMENT TO SAID COVENANTS:

Recorded: MAY 26, 1981
Entry No.: 227721
Book/Page: 290/309

AMENDMENT TO SAID COVENANTS:

Recorded: JUNE 22, 1981
Entry No.: 228446
Book/Page: 291/534

(Continued)

SCHEDULE B - SECTION 2

No. 11056

PART II

SPECIFIC EXCEPTIONS

Excepting therefrom all oil, gas and/or other minerals in, on or under said land, together with the right of ingress and egress for the purpose of exploring and/or removing the same.

DEED OF TRUST

Trustor: SHELLY A. GLAUS
Trustee: UNITED TITLE SERVICES OF UTAH, INC.
Beneficiary: PAT DIXON
Amount: \$82,000.00
Dated: JULY 8, 1994
Recorded: JULY 8, 1994
Entry No.: 472580
Book/Page: 834/135

STREET LIGHT INSTALLATION AGREEMENT

By and Between: THE CITY OF ST. GEORGE
Dated: MARCH 25, 1998
Recorded: MARCH 2, 1999
Entry No.: 638281
Book/Page: 1320/328

I. EASEMENT AND CONDITIONS CONTAINED THEREIN:

Grantor: SHELLY A. GLAUS
Grantee: CITY OF ST. GEORGE, A UTAH MUNICIPAL CORPORATION
Location: The West 7.5 feet of Lot 36, JCR Mobile Estates Subdivision as platted in the Washington County Recorder's Office
Purpose: An easement 7.5 feet in width to construct, install, use, operate, inspect repair, maintain, replace and remove utility lines
Dated: JULY 31, 1999
Recorded: AUGUST 19, 1999
Entry No.: 659111
Book/Page: 1344/324

* * * * *

Judgments have been searched only in the names of SHELLY REYNOLDS-FORD, NILTON L. TIPPETTS, ANGELA RAMSEY, and no other variations thereof, for the eight years last past and none were found.

* * * * *

NOTE: Any matter in dispute between you and the underwriter, (The "COMPANY") concerning the policy or policies issued pursuant to this commitment may be subject to arbitration as an alternative to court action, pursuant to the rules of the American Arbitration Association or other recognized Arbitrator, a copy of which is available upon request from the company. Any decision reached by arbitration shall be binding upon both you and the company. The arbitration award may include Attorney's Fees and may be entered as a judgment in any court of proper jurisdiction.

NOTE: A minimum Cancellation Fee of \$120.00 will be due and payable if no Title Policy has been issued within 90 days following receipt of this report. Said Cancellation Fee, when paid, will be applied as a credit toward the premium charges on the Title Insurance Policy issued in connection with this Commitment within six (6) months of the date of this Commitment.




PAY TO THE ORDER OF PAT DIXON
EIGHTY ONE THOUSAND TWO HUNDRED SEVENTY ONE AND 91/100 DOLLARS

PAT DIXON
211 NORTH 200 WEST
KANAB, UT 84761
MEMO 11056 LB PAYOFF & RELEASE TRUST DEED.
"04 2600" 121240000541 034 13956 8"
AUTHORIZED SIGNATURE

UNITED TITLE SERVICES
PAYOFF & RELEASE TRUST DEED 81,271.91 42600
Date: 10/2/00 NET AMOUNT: 81,271.91
Payee: PAT DIXON
Property: 1803 WEST 1300 NORTH ST. GEORGE UT 84770
Buyer: TIPPETTS, NILTON L. Seller: REYNOLDS-FORD, SHELLY
Closer: LB FileNo: 11056 Escrow: 11056

Copy to send
to Craig
as per Chris

OCT. 3, 2000 4:51PM UNITED TITLE SERV. (435)673.7744 NO. 4448
TO: CRAIG

NON-NEGOTIABLE	 UNITED TITLE SERVICES TRUST ACCOUNT 229 E. ST. GEORGE BLVD., SUITE 200 ST. GEORGE, UTAH 84770	ZIONS FIRST NATIONAL BANK ST. GEORGE OFFICE 40 EAST ST. GEO. BLVD. ST. GEORGE, UTAH 84770 1-800-720-2266	42600
		31-0/1243 34	DATE Oct 2, 2000
	PAY TO THE ORDER OF	PAT DIXON	\$ 81,271.91
	EIGHTY ONE THOUSAND TWO HUNDRED SEVENTY ONE AND 91/100		DOLLARS
	PAT DIXON 211 NORTH 200 WEST KANAB, UT 84761		
MEMO	11056 LB PAYOFF & RELEASE TRUST DEED 01,2000 1:12,000051.2 034, 43955 80		AUTHORIZED SIGNATURE 

UNITED TITLE SERVICES		42600
PAYOFF & RELEASE TRUST DEED		81,271.81
Date: 10/2/00	NET AMOUNT:	81,271.91
Payee: PAT DIXON Property: 1803 WEST 130J NORTH ST. GEORGE UT 84770 Buyer: TIPPETTS, NILTON L. Seller: REYNOLDS-FORD, SHELLY Closer: LB FileNo: 11056 Escrow: 11056		

42636

03/11/02 MON 11 28 [1X/RX NO 5457]